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IN THE

Supreme Court of the United States

October Term, 1966

No. 323

BOOKS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

STANLEY FLEISHMAN,
1680 Vine Street,
Suite 700,
Los Angeles, Calif. 90028,
Counsel for Petitioner.

SAM ROSENWEIN,
LEONARD KAMARAS,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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BOOKS, INC.,

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vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered April 12, 1966.

Opinion.

The opinion of the Court of Appeals [R. 261], printed in Appendix A hereto, is unreported.

Jurisdiction.

The judgment of the Court of Appeals, printed in Appendix B, was entered on April 12, 1966 [R. 268]. On May 11, 1966, the Court of Appeals denied the Petition for Rehearing filed by petitioner on May 6, 1966 [R. 269]. On May 16, 1966, Mandate was stayed [R. 269].

By Order of Mr. Justice Fortas dated June 6, 1966, the time to file this Petition for a Writ of Certiorari

was extended to and including July 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254-(1).

Questions Presented.

1. Whether the book, Lust Job, by Tony Calvano, is entitled to the protections of the free speech and press provisions of the First Amendment, and whether the Federal Government may punish petitioner for distributing said book without violating the First, Ninth and Tenth Amendments.

2. Whether the trial court and the Court of Appeals so construed and applied 18 U.S.C. §1465 as to arbitrarily deprive petitioner of a fair trial and its liberty and property without due process of law, and abridged petitioner's exercise of freedom of speech and press in violation of the First, Fifth and Sixth Amendments, because:

(a) The trial court, upheld by the Court of Appeals, refused to instruct the jury, as requested by petitioner, that the book could not be found obscene if it advocates ideas, or has literary value, or any other form of social importance;

(b) The Court of Appeals ruled that the book does not have social value "from the constitutional viewpoint" even if the dominant theme of the book advocates moral responsibility and the leading of a moral life and acts as a moral catharsis for the average person;

(c) The Court of Appeals ruled that the book could be found obscene without offending the First Amendment, even if it does not appeal to the pru-

rient interest of the average person, on a record in which there is a total absence of evidence that the book was designed for or primarily distributed to any group other than the general public;

(d) The trial court, upheld by the Court of Appeals, refused to instruct the jury that the book must be measured solely by its impact upon the average adult;

(e) The trial court, upheld by the Court of Appeals, instructed the jury that the Government was required to prove only that petitioner "knew the contents of [the] book".

3. Whether the judgment of conviction under 18 U.S.C. §1465 and the indictment herein which rests on no evidence other than the book itself to establish the alleged obscenity of the writing and the alleged unlawful knowledge of the petitioner, deprived petitioner of a fair trial, of its liberty and property without due process of law, and abridged petitioner's freedoms of speech and press, contrary to the provisions of the First, Fifth and Sixth Amendments.

4. Whether the exclusion by the trial court, upheld by the Court of Appeals, of all documentary testimony offered by petitioner to establish the non-obscenity of the book and the absence of scienter on the part of petitioner deprived petitioner of a fair trial and its liberty and property without due process of law and abridged petitioner's freedom of speech and press, all contrary to the provisions of the First, Fifth and Sixth Amendments.

Constitutional Provisions and Statutes Involved.

The constitutional provisions involved are the First, Fifth, Sixth, Ninth and Tenth Amendments; the statutory provisions involved are 18 U.S.C. 1465 and 2b. These constitutional and statutory provisions are printed in Appendix C.

Statement of the Case.

Petitioner, Books, Inc., a distributor of paperback books, was tried under Count II of an indictment that alleged that on or about May 30, 1962 petitioner, a corporation organized and existing under the laws of the State of Rhode Island, with a place of business located in the District of Rhode Island, wilfully and knowingly caused to be transported in interstate commerce from Providence, in the District of Rhode Island, to Worcester, Massachusetts, for the purpose of sale and distribution, more than two copies of "Lust Job", by Tony Calvano, an allegedly obscene book, in violation of 18 U.S.C. §§ 2, 1465 [R. 2]. Petitioner duly filed a Motion for a Bill of Particulars [R. 3]. In response to Court Order granting the Motion, in part, respondent filed its Bill of Particulars, alleging that:

> "it is the government's contention that, to the average person, applying contemporary community standards, the dominant theme of the material of [the book] taken as a whole appeals to the prurient interests. Accordingly, with reference to the book . . . Lust Job . . . it is the government's contention that obscene material permeates the dominant theme of the material of said book, which theme extends from page 5 to page 188 inclusive."[1] [R. 6].

[1]The government did not contend that the book was utterly without redeeming social importance.

The case came on for trial on December 8, 1964 before the Honorable Edward W. Day, United States District Judge, and a jury. The government proved through Irving F. Ephraim, a retailer of books in Worcester, Massachusetts, that petitioner shipped books to the said witness [R. 10]. He testified that he "willingly" gave to an FBI Agent twenty to thirty books, together with an invoice [R. 19-20]. The government next called George E. Hanlon, the FBI Agent who received the books and invoice from the witness Ephraim [R. 143]. He testified that he received a carton from Mr. Ephraim which contained assorted paperback books, including six copies of a book entitled Lust Job [R. 144-145]. He also testified that the witness Ephraim told him that he had gotten the books from petitioner. Thereupon, the book Lust Job was admitted in evidence and read to the jury [R. 36].

The government then rested. Petitioner moved for a judgment of acquittal [R. 37], which motion was denied.

Petitioner called two literary experts who expressed the opinion that the book in question was within customary limits of candor and that the dominant theme of the book was the advocating of moral responsibility and the leading of a moral life [R. 213, 242, App. A. p. 3]. Petitioner also called Harry Kazirian, the local Postmaster [R. 61], who testified concerning the distribution of Playboy Magazine [R. 61]. Petitioner's offer of Playboy Magazine into evidence was rejected [R. 61]. Petitioner then called Martin M. Silverstein, president of Max Silverstein and Son, a distributing firm of newspapers, magazines and paperback books [R. 71]. He testified concerning the availability of var-

ious magazines of the Playboy variety [R. 75-80]. Through this witness, petitioner sought, unsuccessfully, to introduce a publication entitled "The Best From Playboy" [R. 80], and other magazines [R. 88], and the books, "The Carpetbaggers", by Harold Robbins, and "No Adam In Eden", by Grace Matalious. In short, all of the documentary evidence offered by petitioner tending to show customary limits of candor was denied.

On rebuttal, the government called an expert witness, Professor Riley Hughes, who testified that, in his opinion, the book was obscene [R. 56]. The Court of Appeals did not mention his testimony in its Opinion.[2]

At the close of all of the evidence, petitioner filed and orally argued a Motion for a Judgment of Acquittal, which Motion was denied. The jury returned a verdict of guilty and the Court imposed a fine on petitioner of $1500.00 [R. 140].

The Opinion of the Court of Appeals was rendered on April 12 (App. A). With respect to petitioner's argument that the book Lust Job was not obscene, the Court held that, "guided by the controlling opinions of the Justices in the majority of the three cases decided March 21, 1966 in the Supreme Court of the United States . . . as well as earlier cases . . . this Court is bound to conclude that a jury could find Lust Job obscene within the meaning of 18 U.S.C. §1465 and that such application of the statute is not repugnant to the Constitution" (App. A, p. 4). The Court was of the view that the jury could find the book to be utterly without redeeming social importance, even if the domi-

[2]This witness was of the view that for a novel to be literature, it would have to convey to a reader a view of life which is not warped, not partial, but a total view of life [R. 163].

nant theme of the book was the advocating of moral responsibility and the leading of a moral life (App. A, p. 3), and even if the book did not stimulate a prurient response from an average reader, but instead acted as a moral catharsis for such average reader (App. A, p. 5).

With respect to petitioner's argument that the government had failed to prove by competent evidence that the book went substantially beyond customary limits of candor and appealed to the prurient interest of the average person and was utterly without redeeming social importance, the Court of Appeals said that the text of the book itself was sufficient proof as to each of the three distinct elements of obscenity (App. A, p. 4).

The Court of Appeals held that the trial court did not err in failing to instruct the jury, as requested, that the book must be measured solely by its impact on an adult. The Court suggested that the failure to so instruct the jury may have been an academic imperfection, but the Court was of the view that the jury was adequately instructed that the relevant audience was the "typical mature adult reader" (App. A, p. 7), even though the trial court refused to so advise the jury.

The Court of Appeals held that the trial court did not abuse its discretion in excluding all publications offered by petitioner tending to show that the book in question was not obscene and that the petitioner did not have the requisite guilty knowledge to support a conviction (App. A, p. 8).

Finally, the Court of Appeals held that the evidence supported the jury's finding that petitioner acted with the requisite knowledge. The Court summarized the total evidence on this issue, as follows:

> "Ephraim, a Massachusetts retail bookseller, entered into an automatic plan with defendant Books, Inc., a Rhode Island distributor, under which the latter, on its own initiative, chose books and caused them to be transported in interstate commerce for Ephraim to sell. Defendant selected, and caused the interstate transportation of, at least two copies of *Lust Job*, a paperback novel." (App. A, p. 2).

Finding no error, constitutional or otherwise, the Court below affirmed.

Reasons for Granting the Writ.

1. The book, Lust Job, by Tony Calvano, is entitled to the protection of the free speech and press provisions of the First Amendment. In a constitutional sense,[3] the book is not obscene because it does not appeal to the shameful or morbid interest in sex of the average person; it does not exceed contemporary standards in the depiction of sex; it contains ideas, has literary merit, and is of social importance.

A. The Court below recognized that two literary experts, appearing on behalf of petitioner, testified to the value of the book (App. A, p. 3). They testified that the dominant theme of the book is that sexual promiscuity erodes personality [R. 238] and that the book advocates the leading of a moral life, and emphasizes the

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[3]To determine whether the book is entitled to constitutional protection, this Court must exercise an independent constitutional judgment. *Jacobellis v. Ohio*, 378 U.S. 184, 187-190. It would be "an abnegation of judicial supervision" inconsistent with the Court's "duty to uphold constitutional guarantees" to do less [378 U.S. at 187-188]. The Court of Appeals felt itself "bound to conclude that a jury could find Lust Job obscene within the meaning of 18 U.S.C. §1465, and that such application of the statute is not repugnant to the First Amendment" (App. A, p. 4.)

moral responsibility of the individual [R. 20]. Petitioner's first expert witness, Professor Stenberg, testified that the moral responsibility found in the book is reflected in the character of the protagonist Steve Rapallo "who consistently and continually confronts himself each day, finding out where he is going, why he is going where he is going" [R. 226]. He feels that "the demands that are made upon him in the pursuit of his career are slowly leading to a kind of moral degeneration [R. 226]. But he "must sink low enough" before he "discovers his true self" and is able to have "a full moral regeneration" [R. 228].[4] Through the love of a girl named Valerie, he recognizes that he is in danger of being destroyed by his job, which has been the most important element in his life. At the end he turns his back on his old life and can say: " 'Yes, *I* shall quit this job and all of those elements that go with it and lead a new life' " [R. 226]. Petitioner's second expert, Professor Anghinetti, testified that the book contains characterization; that the characterization arises out of the novel; and that the characterization is coherently unified with what happens in the plot. "There is a definite link between the events and what happens to the characters. The characters behave in a way that characters should behave under those circumstances." [R. 237]. He classified the book as a novel because "there are elements and structure within the pages of this book that would classify it clearly as literature. I do not believe it good literature[5] but it is, nevertheless, literature, not pornography" [R. 242-243].

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[4]The notion of "moral compensation" has a long history in Hollywood movies, and in literature. See, *Schumach, The Face on the Cutting Room Floor* (1964) 164-165.

[5]The witness similarly believed that Reader's Digest is not "good literature" [R. 248].

While the book is not sophisticated writing, it reflects a conscious use of a wide variety of techniques which constitute the craft of the fiction writer. The deliberate search for self-knowledge on the part of Steve Rapallo reflects the use of one of the basic literary conventions, used repeatedly by authors at least since the time of Sophocles. The description of the corruption that occurs with the "gnawing lust for power" (p. 67)[6] brings the book into the familiar category of the "slice of life" novels, mirroring, as it does, a broad segment of unprincipled men scrambling to reach the top of the ladder.

As the story opens, the protagonist is trying to understand what has happened to him: "Hell, when you wake up morning after morning with a bitter, ugly taste in your mouth, from too much smoking—

"Too much thinking—

"Then it's time to face down the hellbounds snarling and slashing at your brain.

"When you wonder constantly at the pointlessness of your miserable existence, when you're sick of the nagging self-accusation, when you wish you could turn yourself inside out and be somebody else—

"When you feel like screaming, like clawing the walls—wondering what happened to all your bright sterling silver dreams and ambitions. To your sugar coated ideals." (pp. 7-8).

The self-questioning threads itself through the book: "How had he become so weak? What had ever happened to the inherent decency he'd once known? . . . Would he ever be strong again?" (p. 38). "Suddenly

[6]The page reference is to the book Lust Job.

the reality of his present situation was galling. The self-loathing was an actual, physical entity. The Steve Rapallo I once knew is dead now. . . . It was hard for Rapallo to pinpoint the moment when the great greed began festering in his soul. When it seemed the most important thing in the world that he rise, and keep on rising. When he was ready to push anyone and anything out of his way to achieve his goals. . . . *Know thyself* —God, he didn't want to know himself! He didn't like what he'd just seen. Not one bit!" (pp. 62-72). "But beyond this was the continuing, dull emptiness he felt. The eternal threnody of his life's pointlessness. For what did it matter? Was the job worth the fight? If he kept it, what would it mean? . . . If he remained Burman-Dodge's sales manager would he be happy? Would the nagging, remorseful memories of his past diminish in any way? Would the money buy forgetfulness?" (p. 89).

About midway in the book, and after he meets a fresh and unspoiled girl, a change takes place in Steve Rapallo: "Valerie had, for the first time in his life opened a door for him. She had shown him the true face of love. It was like being suddenly reborn." (p. 117). The self-transformation continues: "Suddenly he didn't care any more. About anything. About this ugly travesty of marriage, about his stupid job, about Kirkland. Only Valerie. There was no point in keeping up this shoddy pretense any longer. *Rip off the mask, reveal the maggot-infested skeleton for what it is!* he raged: *Spit out the pus and phlegm of my betrayal and humiliation once and for all. Consequences be damned!*" (p. 158).

The metamorphosis of Steve Rapallo is reflected by the parallel descriptions at the airport, at the beginning

and end of the book. In the beginning, the scene is described as follows: ". . . When the silvery jet settled down at the Miami International Airport, and the glaring sun caught him full in the eyes, he awoke. He was logy and surly. He stood, reached for his portfolio, found he was still unsteady on his feet. The depression, compounded of anger and deepseated fear, came down anew. *God, he had to get a hold on himself.* The martinis—the corroding memories—were still hanging on. He shrugged, started down the aisle." (p. 22). At the end of the book, the reader sees a quite different Steve Rapallo: "A minute later the silvery bird was airborne, its engines splitting the sky with an earshattering snarl . . . Steve remained on the deck, his hand still, frozen in a last gesture of farewell. . . . As he turned from the rail, a tired, yet confident smile slowly formed on his lips. Then he threw back his shoulders, strode into the terminal, his step quick and purposeful. There was work to be done. And more important, cogent reason for the work to be done." (p. 188).

While retaining the simplicity of sentence structure and language, the author has added interest by use of a variety of methods: foreshadowing events to come, varying the straight dialogue with internal dialogue, using flashbacks, and making each incident serve to both advance the plot and enhance the protagonist's understanding of himself.

Interwoven with the theme of self-transformation through self-knowledge is a sharp criticism of the unscrupulous and selfish methods used to achieve power and success in business. On page 8, contemplating his wife Lonna's adultry, he conceded that "In a way it was

really his own fault. Callow, thirty-year-old assistant managers don't go around breaking the sound barrier, getting on top of a $75,000 a year job every day. They don't take over the sales director's slot in one of the appliance industry's 'big four' by sitting home, making with the 'hold hands by the fireplace' bit. Perhaps he had neglected Lonna, had driven her to seek love and affection in the arms of a lover."

In the next chapter, the author reinforces this notion of the egocentric executive: (p. 40) "Ralph Starkey was a warm, friendly, generous, albeit simple man. Business was his life; there was no room for anything else, even personal considerations. Perhaps it was this simplicity of mind, this preoccupation with the pursuit of the almighty dollar, that had forced Carole to wander in the first place." The author continues to develop this theme when Carole, Starkey's wife says (p. 44): "God, don't you jerks ever talk anything but business? I've had Burman-Dodge up to here. . . . Now change the subject, will you? Or I'm going to leave all three of you good time Charlies flat."

The most direct indictment of the cutthroat methods used to advance in the business world comes with the description of the "secret skulduggery" which Steve uses to advance himself by double crossing his boss, Sam Harker. Similar unscrupulous tactics are used by Clayt Kirkland in his attempt to replace Steve. The conflict between the two, with its ultimate resolution, serves to show the changing character of Steve, to advance the plot, to set the tone of the story and to develop the themes of the book. Steve talks of the loss of his youthful ideals: (p. 62) "Salesmanship had changed all that. Living the high pressure, quota bound life. *Living the big lie.*

It was quickly assimilated, the youthful ideals almost immediately discarded. *Jettison or perish.* The pursuit of the fast buck came first." (p. 64) "True, some of the tricks he used to convert dealers, to unload big orders, were underhanded. But if you twisted the truth a little, if you didn't think too long about the rape of your values, it wasn't so bad. Not bad at all." Steve acknowledges "the corrupted reality of his workday existence." (p. 149).

Contrary to the assertion by the Court of Appeals, the book clearly deals with the "reality of cultural and social conditions" which are of concern to a wide segment of American society. Nor is the description of locale as minimal as would appear from the Opinion of the Court of Appeals (App. A, p. 2). Miami Beach is constantly referred to as "the lotus land". Built on sand, a facade of buildings which house those escaping the reality of life: (p. 25) "A world where sun and beauty and fantastic sensuality were the total why and wherefore of life. Where the pursuit of fun was virtually a religion. Maimi Beach—playground for a nation, hedonistic hothouse where anything goes. Where every human whim—natural and unnatural—is catered to."

In choosing Miami Beach as the microcosm in which to play out his story, the author has obviously chosen carefully and found an appropriate symbol to characterize much that is phony and unsubstantial in contemporary life. What transpires there occurs elsewhere, but the speeded tempo, particularly in connection with an easy-going convention atmosphere, gives credibility to the actions in the story.

Plainly, it is respectfully submitted, the book Lust Job contains ideas, has at least "a modicum" of liter-

ary merit, advocates the moral responsibility of the individual, and has social importance. It cannot be said to be "unqualifiedly worthless" or "utterly without redeeming social value".

For more than thirty years, courts have recognized that books concerning sex have social importance and may not be condemned as obscene. *United States v. Dennett*, 39 F. 2d 565 (C.A. 2 1930); *United States v. One Obscene Book Entitled "Married Love"*, 48 F. 2d 821 (D.C. S.D. N.Y. 1931); *Walker v. Popenoe*, 149 F. 2d 511 (C.A. D.C. 1945).

In *Haldeman v. United States*, 340 F. 2d 59 (10 Cir. 1965), the Court reversed a jury conviction based upon eight booklets[7] "relating to sex and various forms of sexual deviations" (340 F. 2d at 60). The Court observed that however reprehensible or disgusting, the conditions and events described in the book do exist and confront society with perplexing problems, and held that the discussion of these subjects, reflecting life, cannot be said to be utterly without redeeming social importance.

The social value, and the protected nature, of novels dealing with sex has also been recognized. *Grove Press, Inc. v. Gerstein*, 378 U.S. 577; *Tralins v. Gerstein*, 378 U.S. 576; *A Book etc. v. Attorney General of Massachusetts*, 383 U.S. 413; *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433 (2 Cir. 1960) affirming 175 F. Supp. 488 (D.C. N.Y. 1959).

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[7]"Questions and Answers About Cunnilingus"; "Questions and Answers on Sex Physique Disparity"; "Questions and Answers About Oragenital Contacts"; "Questions and Answers on the Sex Life and Sexual Problems of Homosexuals of Both Sexes"; "Revelations of a Sexologist"; "Questions and Answers on Sex and the American Attitude"; "Questions and Answers Involving Sexual Ethics and Sexual Esthetics"; "Questions and Answers on Undinism".

In *Grove Press, Inc. v. Christenberry, supra,* the Court said of "Lady Chatterley's Lover":

> ". . . In these sex descriptions showing how his aristocratic, but frustrated, lady achieved fulfillment and naturalness in her life, he also writes with power and indeed with a moving tenderness which is compelling, once our age-long inhibitions against sex revelations in print have been passed. In actuality, his thesis here is only that pressed continuously in the modern marriage-counseling and doctors' books written with apparently quite worthy objectives and advertised steadily in our most sober journals and magazines. . . ."
>
> (276 F. 2d at 438).

See also, Zeitlin v. Arnebergh, 59 Cal. 2d 901, 383 P. 2d 152, 31 Cal. Rptr. 800; *Larkin v. G. P. Putnam's Sons,* 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 200 N.E. 2d 760.

The First Amendment protections are not limited, of course, to hard cover books, published by established eastern firms. *Ginzburg v. United States,* 383 U.S. 463, 501. Twenty years ago, this Court gave First Amendment protection to "Esquire" Magazine which was thought "to reflect the smoking-room type of humor, featuring, in the main, sex". *Hannegan v. Esquire,* 327 U.S. 146, 151. Finding the controversy to turn on whether the contents of the magazine were "good" or "bad", the Court said that the words "literature" or the "arts" mean "no more than productions which convey ideas by words, pictures, or drawings" (327 U.S. at 153). See also, *Winters v. New York,* 333 U.S. 507, 510.

Courageous trial judges have found books like Lust Job to have the requisite social importance to secure for them First Amendment protection. *Kansas v. A Quantity of Books* (Sedgwick County District Court No. C3595-64 (1965), appeal pending in the Supreme Court of Kansas, No. 44513); *People v. Luros,* Los Angeles Superior Court No. 595183 (1965); *Ballantyne v. Hogue,* Tulare County Superior Court No. 59666 (1964).[8]

In *Kansas v. A Quantity of Books* (App. D), the Court noted that the novels involved were "representative of a stratum of literature that would include such things as mystery stories, sentimental romances, self-confession literature, all rather on a very elemental level geared to individuals who have limited background and ability." (App. D, p. 22).

In *People v. Luros* (App. E), the Court noted that the novels were not without redeeming social importance because they "may have value to marriage counsellors, psychologists, psychiatrists, and to others having a normal interest in this great and motivating natural experience called 'sex' . . ." (App. E, p. 32). The Judge also noted that while the books were erotic, they do not "deviate far from the reality of sex experiences as related by testimony received in this court" (App. E, p. 33). The Court observed that while "some of the sexual relations referred to seemed exaggerated, the 'Kinsey' reports and testimony I have heard in court would seem to indicate they are within the scope of reality" (App. E, p. 33). Reflecting his deep under-

[8]Because each of these three cases is unreported, they are appended hereto. *Kansas v. A Quantity of Books* is Appendix D; *People v. Luros* is Appendix E; *Ballantyne v. Hogue* is Appendix F.

standing of the human condition and its byways, Judge Sprankle said of one of the novels: "I put this book down with a feeling of sorrow and compassion for all lesbians (and male homosexuals as well). It could be argued that any book tending to bring about a better understanding and compassion for any sex deviant might have a redeeming social importance regardless of the literary quality or the words used in the writing. Some will argue to the contrary. However, it is not the function of this court to adjudicate that issue." (App. E, p. 37).

In *Ballantyne v. Hogue* (App. F), the Court said that the novels under consideration appeal "to the normal interest the average person has in matters pertaining to sex and the human condition." (App. F, p. 42). The Court observed that "free societies are dynamic, and that literature and art, including unsophisticated simple novels are merely the mirror reflections of some phase of existing life. Truth, so evidenced, is often bitter and distasteful, but so are many facets of our existence for there is a huge and disproportionate abundance of evil on earth." Judge Wingrove also observed that "writing can reflect the changes which are taking place in a culture. What is good or bad in the past or present, or may be in the future, is described by perceptive writers in various ways and many dialects". (App. F, p. 46).

Former Justice Goldberg, addressing the American Booksellers Association Convention recently, spoke of his "conviction that freedom of speech must be unfettered in literature". He asserted that "there is scarcely any subject of human interest which is not a legitimate matter for self-expression, and which in a

society such as ours, with its traditional devotion to free expression, should not be afforded maximum protection." Finally, Ambassador Goldberg concluded: "In a free society there can be only one safe rule: every presumption must be in favor of free expression in every form, and the heaviest burden is imposed on every governmental restraint of censorship that impairs or abridges the right to punish." *New York Times,* June 7, 1966, 50 C.

Literature, art, and music have social importance and are protected by the First Amendment because "they lead the way toward sensitive and informed appreciation and response to the values out of which the riches of general welfare are created." (Meiklejohn, *The First Amendment Is An Absolute,* The Supreme Court Review, 245, 257). Nor is the protection limited to the "true and the beautiful". "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' *Mill, on Liberty* (Oxford: Blackwell, 1947), at 15: see also *Milton, Areopagitica, in Prose Works* (Yale 1959), Volume II, at 561." *New York Times Co. v. Sullivan,* 376 U.S. 254, 279 n. 19.

B. The dominant theme of the book, taken as a whole, does not appeal to the prurient interest of the average person and is therefore constitutionally protected expression. The mere fact that a work appeals to a sexual interest does not mean, of course, that it appeals to a prurient interest, *i.e.*, a shameful and morbid interest in sex. The typical mature man and woman of our contemporary society has an enormous curiosity concerning matters pertaining to sex, including an inter-

est in sexual matters which would probably have been considered taboo not too many years ago. From the beginning of time, writers, painters, musicians and all others who communicate ideas or emotions by word, sight or sound, have dealt with this basic interest. As Mr. Justice Harlan observed in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 487, "one would not have to travel far even among the acknowledged masterpieces in any of these fields to find works" whose dominant theme is sex.

Petitioner's experts testified that the dominant theme of the book, taken as a whole, is that sexual promiscuity erodes an individual's personality [R. 238]. The Court of Appeals apparently was of the view that the book did not appeal to the prurient interest of the average person, saying, "an otherwise obscene book cannot be held to have from the constitutional viewpoint a redeeming social value because the erotic passages and description of deviate sexual practices instead of stimulating a prurient response from an average reader would disgust and sicken him and act as a moral catharsis" (App. A, pp. 5-6).

Where, as in the case at bar, the book was judged by the jury in the abstract, *A Book, etc. v. Attorney General of Massachusetts,* 383 U.S. 413, 420; where there was no evidence that the book was "designed for and primarily disseminated to a clearly defined deviant group, rather than the public at large", *Mishkin, v. New York,* 383 U.S. 502, 508; and where the jury was instructed that it must judge the book by its impact on the average person [R. 196], it is a denial of due process and a violation of this Court's standards for judging obscenity to condemn the book, as the Court of Appeals

did, on the assumption that it would appeal to the prurient interest of some undefined hypothetical special group. The Court of Appeals said the relevant audience was the "typical reader" in the audience which petitioner's method of distribution of Lust Job sought to reach (App. A, p. 7). This record, however, is totally barren of evidence concerning petitioner's method of distribution of the book Lust Job, or any other book. Nor is the "typical reader" petitioner presumably sought "to catch" identified in the record or by the Court of Appeals. In the *Mishkin* case, this Court emphasized that the special "intended and probable recipient group" must be defined with "specificity" to avoid the constitutional infirmities of the Hicklin test, *Regina v. Hicklin* [1868], L.R. 3 Q.B. 360. In the case at bar, it is respectfully submitted, the Court of Appeals applied the discredited and unconstitutional "most-susceptible-persons-test", *Roth v. United States*, 354 U.S. 476, 489. Moreover, the Court of Appeals erroneously held that the "prurient interest" test was met if the book "would disgust and sicken" the average reader (App. A, p. 6). This test was discarded seventy years ago, *Swearingen v. United States*, 161 U.S. 446.

The book Lust Job does not appeal to the shameful, morbid interest in sex of the average normal adult and, accordingly, cannot be found to be obscene in a constitutional sense.

C. The book does not go substantially beyond customary limits of candor in the description or representation of matters pertaining to sex. In *Jacobellis v. Ohio*, 378 U.S. 184, this Court made plain that "the Roth standard requires in the first instance a finding that the material goes substantially beyond customary limits of

candor in description or representation" of matters pertaining to sex, nudity or excretion and that the standards to be followed are national, not local.

In *Grove Press v. Christenberry,* 175 F. Supp. 488, 502 (D.C. N.Y. 1959), affirmed 276 F. 2d 433 (2 Cir. 1960), District Judge van Pelt Bryan stated:

> ". . . the broadening of freedom of expression and of the frankness with which sex and sex relations are dealt with at the present time require no discussion. In one best selling novel after another frank descriptions of the sex act and 'four-letter' words appear with frequency. These trends appear in all media of public expression, in the kind of language used and the subjects discussed in polite society, in pictures, advertisements and dress, and in other ways familiar to all. Much of what is now accepted would have shocked the community to the core a generation ago. Today such things are generally tolerated whether we approve or not."

It was against this background that petitioner's experts testified that Lust Job does not go beyond customary limits of candor in describing sexual matters. This conclusion is not only compelled by a comparison of the book Lust Job with those writings which have been afforded constitutional protection by the judicial determinations of this Court and other courts in the federal and state jurisdictions, *Klaw v. United States,* 350 F. 2d 155, 158-159 (2 Cir. 1965), but also from a perusal of the contemporary scene where there is a frankness and candor in the discussion of sex in books which are generally accepted in the community today, and which frankness and candor Lust Job does not even attempt. To condemn this book as obscene when it is well

within what society generally tolerates, is a denial of due process and freedom of speech and press. *Smith v. California,* 361 U.S. 147, 171.

D. Petitioner is mindful that in a "close case" the circumstances of production, sale and publicity are now relevant. But, as demonstrated above, this is not a "close case", unless one says that every book dealing with sex is such a case. Moreover, there is nothing in the circumstances of production, sale and publicity which amounts to pandering. The total case against petitioner rests upon its mailing to a reputable retail book establishment an assortment of books, including two or more copies of Lust Job. There is no evidence that petitioner published the books or promoted them in any fashion. There is no evidence of the "pandering" activity found in *Mishkin* and *Ginsburg.*

It is respectfully submitted that there is no evidence in the record to support the conclusion of the Court of Appeals "that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values" (App. A, p. 6). Presumably, the court had in mind that petitioner made a profit from its sale of books. But this Court emphasized in *Ginzburg* that this is insufficient to support a finding of pandering. 383 U.S. at 474.

2. The trial court and the Court of Appeals failed to apply constitutional standards, and, applied unconstitutional standards in condemning the book.

A. The trial court, upheld by the Court of Appeals, refused to instruct the jury, as requested by petitioner, as follows:

> "Material dealing with sex in a manner that advocates ideas or that has literary or scientific

> or artistic value or any other form of social importance might not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal; for a work cannot be proscribed unless it is 'utterly' without social importance." [R. 134-135].

The failure to so instruct the jury was plain error, of constitutional significance. *Jacobellis v. Ohio*, 378 U.S. 184: *A Book, etc. v. Attorney General of Massachusetts*, 383 U.S. 413.

Moreover, the indictment, as amplified by the Bill of Particulars, filed by the government, failed to charge that Lust Job was utterly without redeeming social importance [R. 6].

B. The Court of Appeals ruled that the book does not have social value "from the constitutional viewpoint" even if the dominant theme of the book advocates moral responsibility and the leading of a moral life and acts as a moral catharsis for the average person (App. A, p. 5). This determination by the Court of Appeals is in conflict with *Jacobellis v. Ohio*, 378 U.S. 184 and *A Book, etc. v. Attorney General of Massachusetts*, 383 U.S. 413. A book must be "unqualifiedly worthless before it can be deemed obscene." If it possesses even "a modicum of social value", it is entitled to constitutional protection.

C. The Court of Appeals relying exclusively on *Mishkin*, ruled that the book could be found obscene without offending the First Amendment, even if it does not appeal to the prurient interest of the average person

(App. A, p. 5), even though the record is totally devoid of evidence that the book was designed for or primarily distributed to any group other than the general public. *Mishkin*, however, holds that absent proof in the record that the work is designed for, and primarily distributed to, a clearly defined deviant sexual group, the book must be measured solely by its prurient appeal to the average person, it could still be condemned as obscene. *Mishkin*, however, holds that absent proof in the record that the work is designed for, and primarily distributed to, a clearly defined deviant sexual group, the book must be measured solely by its prurient appeal to the average person. There is not a shred of evidence that the book was designed for or distributed to any group other than the general public. To measure the book by its supposed prurient appeal to some unidentified hypothetical group plainly violates constitutional standards, *Roth v. United States*, 354 U.S. 476, 489; *Mishkin v. New York*, 383 U.S. 502, 509, and is a return to the unhappy days of *Regina v. Hicklin*.

D. The trial court refused to instruct the jury, as requested, that the average person is an adult. Instead, the trial court advised the jury that in determining whether the book appeals to the prurient interest of the average person, the jury should consider "all those" the book "was likely to reach". The Court of Appeals, saying that it was not concerned "with academic perfection" held that: "Laymen would regard, as indeed we do, the instruction as directing attention to the affect of the book upon a typical mature adult reader which defendant's method of distribution of Lust Job sought to reach". Since there is nothing in the record as to petitioner's method of distribution, there is no way of

telling what group the Court of Appeals thought petitioner "sought to reach". With all deference, it is submitted, the instruction, and the interpretation placed upon it by the Court of Appeals, represents a subtle retreat to the *Hicklin* test. Nothing but a clear instruction to the jury that is must measure the appeal of a book solely by its impact on the average normal adult can suffice to give appropriate guidance to a jury in a federal obscenity prosecution.

E. The trial court, upheld by the Court of Appeals, instructed the jury that the government was required to prove only that petitioner knew the contents of the book. The question of whether in a federal obscenity prosecution proof of the knowledge of the contents of a book is sufficient is of constitutional importance.[9] In *Mishkin v. New York,* 383 U.S. 502, this Court construed the state obscenity statute as establishing standards for determining "the vital element of scienter" more stringent than mere knowledge of the contents of a writing. This Court held that proof of guilty knowledge was required in obscenity prosecutions in order "to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity" 383 U.S. at 511.

3. The book itself was the only evidence relied on by the Court of Appeals to establish the alleged obscenity of the writing and the alleged unlawful knowledge of the petitioner.

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[9]Similar issues with respect to questions of *scienter* are presented in *Redrup v. New York,* October Term, 1965, No. 72, certiorari granted April 25, 1966 (34 U.S. Law Week. 3363); and *Austin v. Kentucky,* October Term, 1965, No. 453, certiorari granted April 25, 1966 (34 U.S. Law Week. 3363).

A. The Court of Appeals erroneously concluded that "there was adequate evidence in the text of the novel, without any reference to the covers, to warrant a factual determination that the dominant theme of the book taken as a whole appeals to a prurient interest in sex, that the book is patently offensive, because it affronts contemporary community standards relating to the description of sexual matters, and that the material is utterly without redeeming social value" (App. A, p. 4).

Where the "transcendent value of speech" is involved, due process requires "that the state bear the burden of persuasion to show that the (accused) engaged in criminal speech."

Speiser v. Randall, 357 U.S. 513, 526; *Freedman v. Maryland,* 380 U.S. 51; *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 271, 277-280, 283-288; *Thompson v. City of Louisville,* 362 U.S. 199, 206, and cases cited in fn. 13.

Books and writings do not in themselves prove such elements as contemporary standards, prurient interest or social importance. Whether a book exceeds limits of candor, or appeals to a shameful or morbid interest in sex, or is utterly worthless, can only be established by evidence and not by conjectures, presumptions or subjective reactions. *Tot v. United States,* 319 U.S. 463; *New York Times Co., et al. v. Sullivan,* 376 U.S. 254; *United States v. Romano,* 382 U.S. 136. As this Court has warned on different occasions, and as the Court of Appeals of the Second Circuit made clear in *United States v. Klaw,* 350 F. 2d 155 (2 Cir. 1965), courts and juries in obscenity prosecutions do not sit to act as censors of material personally distasteful to them.

Without proof by evidence, reviewable by an appellate court, that limits of candor have actually been exceeded, or that a writing appeals to no other interest but prurient interest, or is without any importance at all, there is little assurance, it is submitted, that non-obscene writings can be protected. As was stated by the Court of Appeals in *Klaw,* "it is the record and not our feelings that must control. . . . Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity" (350 F. 2d, at 170).

To permit suppression and punishment without proof of the essential ingredients of an offense, ingredients which are made necessary by the requirements of the Constitution, undermines a broad category of rights guaranteed by the free speech and press and due process provisions of the Constitution. The right to fair notice and hearing, the right of confrontation and the assistance of counsel are meaningless and constitute a mere gloss when the prosecution is not required to prove the elements of an offense. *Pointer v. Texas,* 380 U.S. 400; *Douglas v. Alabama,* 380 U.S. 415; *Brookhart v. Janis,* 86 S. Ct. 1245; *Turner v. Louisiana,* 379 U.S. 466. Without proof of the elements of the offense of obscenity, "it would be altogether too easy for any prosecutor to stand before a jury, display the exihibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured." *United States v. Klaw, et al.,* 350 F. 2d at 170.

B. As heretofore noted, the jury was advised that the government was required to prove only that the petitioner knew the contents of Lust Job to meet the

scienter requirement of 18 U.S.C. §1465 [R. 195]. While petitioner contends that mere knowledge of contents is insufficient to meet the constitutional requirements laid down by this Court, there is a total absence of proof in this record that petitioner even knew the contents of the book. The record here reveals only that petitioner sent an assortment of books from Providence, Rhode Island, to a reputable bookseller in Massachusetts and that the bookseller turned some of the books over to an FBI Agent. There was no evidence that any officer of petitioner corporation read Lust Job or had any information as to its contents. There is not a shred of evidence by way of conduct or admissions to support the implied finding of the jury, upheld by the Court of Appeals, that petitioner knew the contents of the book or believed it to be obscene. To permit a conviction solely upon proof that petitioner shipped the book in interstate commerce, without proof of knowledge of contents and without proof of knowledge of obscenity, is, in effect, to punish guiltless behavior. Such a standard permits arbitrary assumption of facts essential to guilt; undermines all of the procedural safeguards required in prosecutions involving speech and press; and encourages the self-censorship and private suppression of constitutionally protected material which the Constitution is intended to prevent. *Speiser v. Randall,* 357 U.S. 513; *Smith v. California,* 361 U.S. 147; *Freedman v. Maryland,* 380 U.S. 51; *Elfbrandt v. Russell,* 86 S. Ct. 1238; *United States v. Romano,* 382 U.S. 136; *New York Times Co. v. Sullivan,* 376 U.S. 254.

4. The trial court, upheld by the Court of Appeals, excluded all documentary evidence tendered by petitioner

intended to establish the non-obscenity of the book and the absence of unlawful knowledge and intent on the part of petitioner. At the trial, petitioner sought to introduce in evidence Playboy Magazine [R. 61] and other magazines [R. 88] and books such as The Carpetbaggers [R. 86]. All of this documentary evidence was excluded by the trial court.

In affirming this exclusion, the Court of Appeals recognized that the trial judge refused to permit petitioner "to introduce in evidence a large number of publications currently available in Rhode Island so that from them the jury could then have formed its opinion of community standards" (App. A, p. 8). The court recognized that "what is sold in the market reflects to some extent community standards", but went on to say that not "every item sold is necessarily not obscene" (App. A, p. 8). While this statement may be true, it has no relevance in the case at bar. The magazines, such as Playboy and the books such as The Carpetbaggers, which petitioner sought to introduce, were on the market for so long and had been accepted so universally that no valid argument could be made that these publications were obscene. Hence, the courts below excluded non-obscene publications which tended to reflect the broad toleration of society for works frankly dealing with sex.

The Court of Appeals also stated that the trial judge was not required to admit as a touchstone for the jury

even those books which are admittedly not obscene because "the admission of a number of different publications alleged to be comparable to the publications in issue might make the trial unmanageably complex and lengthy" (App. A, p. 8). But the question here is not the limits a trial court might appropriately impose as to the number of books to be admitted, since the trial court excluded *all* such non-obscene comparable works. Finally, the Court of Appeals stated that "the trial judge must be allowed wide discretion as to whether to permit the introduction of such allegedly comparable publications" and that "the trial judge did not abuse his discretion" (App. A, p. 8). The best, and perhaps the only, way a trier of fact may determine whether a challenged work goes substantially beyond customary limits of candor is to compare it with works society generally tolerates. Accordingly, in a federal obscenity trial, it is an abuse of discretion, a denial of due process, and an infringement on freedom of the press to exclude all documentary evidence offered by a defendant which might enlighten a jury and enable it to make a reasoned, rather than an emotional, judgment. *Smith v. California,* 361 U.S. 147, 165, 171-172; *Speiser v. Randall,* 357 U.S. 513, 520; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 497; *Klaw v. United States,* 350 F. 2d 155; *In re Harris,* 56 Cal. 2d 856, 16 Cal. Rptr. 889, 366 P. 2d 305; *Yudkin v. State,* 229 Md. 223, 182 A. 2d 798.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioner.

SAM ROSENWEIN,
LEONARD KAMARAS,
Of Counsel.



APPENDIX A.

Opinion of the Court of Appeals.

United States Court of Appeals for the First Circuit.

Books, Inc., Defendant, Appellant, v. United States of America, Appellee. No. 6552.

Appeal From the United States District Court for the District of Rhode Island.

Before Aldrich, *Chief Judge,* McEntee, *Circuit Judge,* and Wyzanski, *District Judge.*

Leonard A. Kamaras, with whom *John H. DiStefano* was on brief, for appellant.

Frederick W. Faerber, Jr., Assistant U. S. Attorney, with whom *Raymond J. Pettine,* United States Attorney, was on brief, for appellee.

OPINION OF THE COURT

April 12, 1966.

Wyzanski, *District Judge.* Books, Inc., a distributor of paperback books, appeals from a $1500 fine imposed following a jury verdict that, in violation of 18 U.S.C. § 1465 and § 2(b),[1] it had knowingly caused to be transported in interstate commerce for the purpose of sale or distribution *Lust Job,* an obscene book. The prin-

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[1]18 U.S.C. §1465 "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . ."

18 U.S.C. §2(b) "Whoever willfully cause an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal." As amended Oct. 31, 1951, c. 655 §17b, 65 Stat. 717.

cipal issue presented on appeal is whether the District Judge should have ruled as a matter of law that the book was not obscene in the statutory or constitutional sense. Other issues are raised as to rulings during the taking of testimony and as to denials of requests for instructions.

Ephraim, a Massachusetts retail bookseller, entered into an automatic plan with defendant Books, Inc., a Rhode Island distributor, under which the latter, on its own initiative, chose books and caused them to be transported in interstate commerce for Ephraim to sell. Defendant selected, and caused the interstate transportation of, at least two copies of *Lust Job,* a paperback novel.

Following indictment under 18 U.S.C. § 1465, defendant moved for a bill of particulars. In response, the United States Attorney stated "it is the Government's contention that obscene material permeates the dominant theme of the material of said book [*Lust Job*], which theme extends from page 5 to page 188 inclusive." Those pages set forth, in the form of a novel, a tale exclusively devoted to the sexual adventures of its principal characters. Adulteries, seductions, and orgies are the only events of importance. The contacts described include not only sexual intercourse, but sodomy and other perversions. There is not any serious effort to portray the reality of cultural or social conditions of even the most neurotic or sordid portion of the population. Description of the locale is minimal. The style is flaccid, repetitive, and unreflective of the author's individuality.

On the front cover of the book is an unclothed woman, her back toward the reader. She is seated on the floor, her back and buttocks showing, her head tilted

backwards and her arms clasping below the knees the trousers of a clothed man. The title *Lust Job* is printed so that it crosses the woman's back. Above the woman's head and across the man's trousers are the words "He climbed to the top on a ladder of sin." On the rear cover appears the following description of the book:

> "SELFISH PASSIONS . . .
> drove Steve Rapallo, a handsome, eager young executive as he clawed his way up the lust ladder to success. Success in money and bed, the only two things that seemed to matter. And to hell with the way he got them. Take Carol—which he did—the wanton wife of his boss, whose only desire was to get between the sheets and stay there. And Rapallo was just the chamber stud she needed. It was a ball, and it was Miami Beach and it was the annual convention. A time for fun. A time for sin. A time for shame and lust and everything that added up to wild bedroom orgies where nobody cared what anybody did as long as they did it and never stopped! . . . GUTTER LOVE!"

Defendant offered as literary experts two assistant professors of English literature at Rhode Island College. Mr. Sternberg testified that *Lust Job* was "poor literature" but the dominant theme was "the advocating of moral responsibility and the leading of a moral life." Mr. Anghinetti stated that he did not believe the book had literary merit, but its "redeeming quality" was "its element of condemnation of sexual behavior."

The other evidence does not need to be recited before turning to the principal question raised on this appeal, that is whether, responding to defendant's motion at the conclusion of the Government's case-in-chief, or its mo-

tion at the end of all the testimony, the District Judge should have entered a judgment of acquittal on the ground that *Lust Job* was not, as a matter of law, an obscene book under 18 U.S.C. § 1465 or under the First Amendment to the United States Constitution.

Guided by the controlling opinions of the justices in the majority in the three cases decided March 21, 1966 in the Supreme Court of the United States, *Ginzburg v. United States,* Oct. Term 1965, No. 42, *Mishkin v. New York,* Oct. Term 1965, No. 49, and *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts,* Oct. Term 1965, No. 368 (the *Fanny Hill* case), as well as earlier cases such as *Roth v. United States,* 354 U.S. 476, *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, and *Jacobellis v. Ohio,* 378 U.S. 184, this Court is bound to conclude that a jury could find *Lust Job* obscene within the meaning of 18 U.S.C. § 1465, and that such application of the statute is not repugnant to the First Amendment. Under the most recent Supreme Court decisions, there was adequate evidence in the text of the novel, without any reference to the covers, to warrant a factual determination that the dominant theme of the book taken as a whole appeals to a prurient interest in sex, that the book is patently offensive because it affronts contemporary community standards relating to the description of sexual matters, and that the material is utterly without redeeming social value.

Moreover, we recognize that in close cases, where it is doubtful if a text is obscene, a majority of the Supreme Court of the United States deems it appropriate to look at the circumstances under which the text was commercially offered. *Ginzburg v. United States, Mishkin v.*

New York, Memoirs v. Massachusetts. Where publications have been created or exploited entirely on the basis of their appeal to prurient interests, a conclusion is permissible that the merchandise transported, sold, or otherwise dealt in, is obscene in the statutory sense and is not constitutionally protected matter. *Ginzburg v. United States,* slip opinion p. 11. Under the foregoing rule, it would be appropriate either for the District Court or this Court to take into account the front and back covers of *Lust Job* and from them to reach a conclusion that there were pandering, and an exploitation of interests in titillation, and that, therefore, the text of *Lust Job* itself is obscene.

Nothing is to be gained by a detailed comparison of *Lust Job* and the publications before the Supreme Court in the *Ginzburg* or *Mishkin* cases. Quite plainly *Lust Job* could be found to equal or exceed some of those publications in prurient appeal and patent offensiveness. Likewise, it could be found to be without redeeming social value.

Nor can defendant successfully bring itself within the scope of the decision in *Memoirs v. Massachusetts* involving *Fanny Hill.* Unlike that book, *Lust Job,* in the opinion of defendant's own experts, has no modicum of literary value. To be sure, defendant's literary experts asserted that the book had a purgative moral value. But for two reasons this testimony had no probative force: first, it was not within the alleged expert qualifications of the witnesses; and second, an otherwise obscene book cannot be held to have from the constitutional viewpoint a redeeming social value because the erotic passages and the description of deviant sexual practices instead of stimulating a prurient response from an average reader

would digest and sicken him and act as a moral catharsis. *Mishkin v. New York,* slip opinion p. 6. Moreover, in the case at bar there is evidence, which was absent in *Memoirs v. Massachusetts,* "that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values." See *Memoirs v. Massachusetts,* slip opinion p. 6.

Defendant raises a number of points with respect to the trial, all of which we have examined, but of which it seems to us only two require comment in this opinion.

Defendant, mindful of the obscenity test enunciated in *Roth v. United States,* 354 U.S. 476, 489, that is, "whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to prurient interest", requested an instruction that "The average person, as construed and applied, must be the adult within the community, being the nation at large and anyone less than an adult must be absolutely excluded from your consideration." The District Judge, instead, gave a charge, of which the pertinent part is quoted in the footnote[2] placing emphasis on the "effect of the book . . . not upon any particular class, but upon all those it was likely to

[2]"The first test to be applied by you in determining whether said book, 'Lust Job,' is obscene is whether the dominant or most obvious theme or purpose of said book, when viewed as a whole and not part by part, is an appeal to the prurient interest of the average person of our national community. It is not whether it would arouse lustful thoughts in those comprising a particular segment of our community, such as the young, the immature, or highly prudish, or, on the other hand, would leave another segment, such as the scientific or highly educated, or the so-called wor[l]dly-wise and sophisticated, indifferent and unmoved. The test is the effect of the book considered as a whole not upon any particular class, but upon all those it was likely to reach; in other words, its impact upon the average person in our national community in 1962."

reach; in other words, its impact upon the average person in our national community."

In appraising this charge, we bear in mind that it was delivered orally, and that we are concerned not with academic perfection but with the way the language would be understood by a jury. Laymen would regard, as indeed we do, the instruction as directing attention to the effect of the book upon a typical mature adult reader in the audience which defendant's method of distribution of *Lust Job* sought to reach. Focus on such a typical reader whom defendant sought "to catch" comports with the decision with respect to *The Housewife's Handbook* in *Ginzburg v. United States,* see particularly slip opinion, pp. 8-9.

It is plain that *Butler v. Michigan,* 352 U.S. 380, has no application to the case at bar. The charge in the instant case does not permit the jury to use as the test of pruriency, or of community standards, or of other aspects of obscenity the effect of the book upon children as a class. Nor does the charge emphasize, as did the trial judge in the findings reviewed in *Ginzburg v. United States,* slip opinion, p. 2, f. 3, the effect of the book upon "children of all ages, psychotics, feebleminded and other susceptible elements." On the contrary, here the jury was directed to consider as the measuring rod the total market at which defendant aimed, and to consider specifically the average mature person in that market, neither the very immature nor the very sophisticated. Such a measuring rod is appropriate.

The other point deserving of our comment is the refusal of the trial judge to permit defendant to introduce in evidence a large number of publications cur-

rently available in Rhode Island so that from them the jury could better form its opinion of community standards. It is, of course, true that what is sold in the market reflects to some extent community standards. But it is not true that every item sold is necessarily not obscene. Hence, not every book sold in the market is admissible to test the obscenity of *Lust Job*. Nor is a judge required to admit as a touchstone for the jury even those books which are admittedly not obscene. The admission of a number of different publications alleged to be comparable to the publication in issue might make the trial unmanageably complex and lengthy. The trial judge must be allowed wide discretion as to whether to permit the introduction of such allegedly comparable publications, and as to whether to allow the witnesses to be examined in detail on publications other than the one directly at issue. Here the trial judge did not abuse his discretion.

Affirmed.

APPENDIX B.

Judgment of the Court of Appeals.

On the same day, April 12, 1966, the following judgment was entered:

JUDGMENT

April 12, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
/s/ Roger A. Stinchfield
Clerk.

Enter:
/s/ Aldrich, *Ch. J.*

APPENDIX C.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

3. The provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

4. The provisions of the Ninth Amendment to the United States Constitution are:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

5. The provisions of the Tenth Amendment to the United States Constitution are:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

6. 18 U.S.C. § 1465 provides:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . ."

7. 18 U.S.C. §2(b) provides:

"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal." As amended Oct. 31, 1951, c. 655 §17b, 65 Stat. 717.

APPENDIX D.

Unreported Opinion of the Case of Kansas v. A Quantity of Copies of Books, No. C-3595-64 in the District Court of Sedgwick County, Kansas.

In the District Court of Sedgwick County, Kansas.

State of Kansas, Ex. Rel. Robert C. Londerholm, Attorney General, Plaintiff, vs. A Quantity of Copies of Lewd, Lascivious and Obscene Books, Titled, "Sin Hooked," "Bayou Sinners," "Lust Hungry," "Shame Shop," "Fleshpot," "Sinners Seance," "Passion Priestess," "Penthouse Pagans," "Shame Market," "Sin Warden," "Flesh Avenger." Defendants.

Francis G. Vater, et al., Case No. C-3595-64.

MEMORANDUM DECISION

This action was instituted on July 24, 1964 by William M. Ferguson, then Attorney General of the State of Kansas, by the filing of an Information. By Order filed January 25, 1965, Robert C. Londerholm, present Attorney General, was substituted for William M. Ferguson as relator in this proceeding.

By this action the plaintiff requested an Order directed to the owner of the books to appear before this Court and show cause why a warrant should not be issued to the Sheriff of Sedgwick County, Kansas directing that said prohibited books be brought before this Court for further disposition according to law.

On July 25, 1964, the Honorable Howard C. Kline, Judge of Division No. 2 of this Court, issued an Order to Show Cause in accordance with the prayer in the Information.

Francis G. Vater and Joe Rector, Jr., co-partners doing business as Rector's Book Store, have intervened.

On August 20, 1964, Judge Howard C. Kline disqualified himself as judge in this action. Pursuant to Rule No. 4 of this Court, the case was reassigned to Division No. 6.

At the pre-trial conference on November 23, 1964 held before the Honorable E. E. Sattgast, then judge of Division No. 6 of this Court, it was stipulated that:

(a) Agents or representatives of the Attorney General in the month of July, 1964, purchased from open counters or rack displays, where they were offered for sale to the general public, the eleven titles named in the Information, said titles having been filed in this proceeding as Exhibits "A" through "K", at Rector's Book Store, 133 North Broadway, Wichita, Kansas.

(b) Francis G. Vater and Joe Rector, Jr. are co-partners operating Rector's Book Store, at 133 North Broadway, Wichita, Kansas, and in the course of a year's business in that store handle and offer for sale to the general public large quantities of written and printed publications of all kinds dealing with every conceivable subject; that such written and printed publications are supplied by established publishing houses and comprise daily and weekly newspapers, magazines, books and prints containing material concerning religion, philosophy, science, literature, art, and all subjects relating to ideas and graphic arts of interest to readers and students of printed words and ideas and the graphic arts; that everyone patronizing Rector's Book Store has a free choice in the purchase of the printed matter for sale at the store; that the proprietors of Rector's Book

Store have not read the eleven titles involved in this action and do not read nor presume to read as a matter of course the printed material which is offered for sale in such store.

The Order to Show Cause was heard by Judge Sattgast on December 10, 1964. No witnesses were called by plaintiff in support of his case. The only evidence introduced on behalf of plaintiff was the eleven books named in the Information.

Robert Bruce Cutler testified as an expert witness on behalf of the defense.

In addition, the following books were introduced into evidence by the defense:

Eternal Fire by Calder Willingham
City of Night by John Rechy
Tropic of Capricorn by Henry Miller
Lady Chatterley's Lover by D. H. Lawrence
Another Country by James Baldwin
Fanny Hill by John Cleland
The Carpetbaggers by Harold Robbins
Tropic of Cancer by Henry Miller
My Life and Loves by Frank Harris

Plaintiff offered no evidence in rebuttal.

Upon the death of the Honorable E. E. Sattgast, this case was reassigned to Division No. 7, pursuant to Rule No. 4 of this Court.

The Court has read each of the twenty volumes introduced into evidence, comprising a total of 6,395 pages.

In addition, the Court has examined the transcript of testimony received on December 10, 1964, and the

numerous citations of law as contained in briefs submitted by the plaintiff and the defense.

A determination as to whether the subject books are obscene, and whether the requested warrant should issue, must be based upon applicable statutes of the State of Kansas, provisions of the Constitutions of the United States and the State of Kansas, and precedents established by decisions of the United States Supreme Court and the Supreme Court of the State of Kansas.

Section 21-1102 (a), Kansas Statutes Annotated, provides, in part, as follows:

> "Any person who shall . . . sell, . . . or distribute any book, . . . publication or other thing, containing obscene, immoral, lewd or lascivious language, or obscene . . . descriptions, manifestly tending to the corruption of the morals of persons, . . . shall be guilty of a misdemeanor."

Section 21-1102 (b), Kansas Statutes Annotated, provides:

> "The test to be applied in cases under subsection (a) of this section shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent and unmoved. But such test shall be the effect of the book, picture or other subject to complaint considered as a whole, not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture or other subject of complaint must

be judged as a whole in its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

Section 21-1102a., Kansas Statutes Annotated, provides, in part, as follows:

"Any person who . . . distributes for resale or for reading . . . any book, magazine or pamphlet, so composed as to constitute a compilation of . . . words, stories . . . featuring and primarily devoted for the purpose of commercial exploitation, to the description or portrayal or suggestion of illicit sex, or sexual relations, of perversion, lust or sexual passion, or to any combination thereof, shall be guilty of a violation of section 1 (21-1102) of this act . . ."

Section 21-1102c., Kansas Statutes Annotated, provides procedure for issuance of search warrants, seizure and destruction of items found to be in violation of the provisions of this act.

The First Amendment to the Constitution of the United States provides, in part, as follows:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in part, as follows:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or prop-

erty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 11 of the Bill of Rights of the Constitution of the State of Kansas provides, in part, as follows:

"The liberty of the press shall be inviolate: and all persons may freely, speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; . . ."

It is contended by the defense that the Kansas Statute, on its face and as construed and applied, is unconstitutionally broad and vague, violating the due process and free speech provisions of the federal and state constitutions.

In the opinion of this Court, the statute is adequate. The definition of obscenity generally conforms to the definition adopted by the Supreme Court of the United States. Further, in the case of *State v. A Quantity of Copies of Books* (191 Kan. 13), the Supreme Court of the State of Kansas stated:

"Turning to the statute (G.S. 1961 Supp. 21-1102a) we readily see that the first section contains a definition of obscenity. We believe that the test for obscenity which is provided is adequate and we are applying it in this case."

It is further contended that the absence in the Statute of a right to a jury trial, and the refusal to grant defendants' request for a jury trial and jury determination of the issue of obscenity, renders the statute unconstitutional on its face and as construed and applied, in violation of the free speech and press

and due process provisions of the First and Fourteenth Amendments to the United States Constitution.

The Supreme Court of this State affirmatively held in *State v. A Quantity of Copies of Books* (191 Kan. 13) that there is no right to a jury trial in a case such as the one at bar. This action arises out of a statute. There is no basis for the action at common law.

The Court finds that there was no right to a jury trial in this case.

It is further argued by the defense that the procedure employed by the plaintiff herein is without statutory authority.

By its decision in *A Quantity of Copies of Books et al. v. Kansas* (378 U.S. 205), the Supreme Court of the United States held:

> "A state's seizure of allegedly obscene paperback novels, without a prior adversary determination of their obscenity, and a subsequent court order directing the county sheriff to stand ready to destroy them, are unconstitutional."

The defense argues that plaintiff is attempting, by employing this procedure, to breathe life into a statute which has been declared to be constitutionally deficient.

In the opinion of this Court, the procedure employed in the case provided adequate safeguards against the suppression of non-obscene books. By affording an adversary determination of obscenity prior to seizure, plaintiff had adequately met the requirements imposed by the U.S. Supreme Court in the case of *A Quantity of Copies of Books v. Kansas.*

It is further contended by the defense that the books named in the Information are not obscene.

This Court is bound by the decisions of the Supreme Court of the United States as to what is within the range of permissible publications under the freedom of the press provisions of the Constitution. We must apply the test of obscenity as set forth by that Court.

The U. S. Supreme Court in the case of *Roth v. United States* and *Alberts v. California* (354 U.S. 476) held:

> "The proper test is whether, to the average person, applying contemporary community standards, the dominant theme of the material in question, when taken as a whole, appeals to prurient interest."

In defining "prurient interest", the Court cites and approves the definition contained in the A.L.I. Model Penal Code:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e. a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ."

The *Roth* decision further quotes the definition of "prurient" contained in Webster's New International Dictionary (Unabridged, 2nd ed., 1949.)

> "Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd."

It was further held in *Roth v. United States:*

> "Obscenity is not within the area of constitutionally protected speech or press."

"Sex and obscenity are not synonymous, obscene material being material which deals with sex in a manner appealing to prurient interest."

"The portrayal of sex in art, literature, and scientific works is not itself sufficient reason to deny the material the constitutional protection of speech and press."

"All ideas having even the slightest social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the constitutional guaranties of free speech and press, unless excludable because they encroach upon the limited area of more important interests."

In the leading case of *Jacobellis v. Ohio* (378 U.S. 184) the Supreme Court of the United States has enlarged upon the standards laid down in the *Roth* case. In this case, the Court stated:

"It should also be recognized that the *Roth* standard requires in the first instance a finding that the material goes substantially beyond customary limits of candor in description or representation of such matters."

In the case of *Jacobellis v. Ohio* the U. S. Supreme Court further held:

"The constitutional status of an allegedly obscene work must be determined on the basis of a national standard."

"Obscenity is excluded from constitutional protection only because it is utterly without redeeming social importance."

It is in the light of the foregoing decisions that the Court must determine whether the subject material in this case is obscene.

At the hearing before Judge Sattgast on December 10, 1964, Robert Bruce Cutler testified as an expert witness on behalf of the books named in the Information and Rector's Book Store.

Robert Bruce Cutler is an Associate Professor of English at Wichita State University where he has been employed since 1960. He was a Graduate Teaching Fellow and Instructor in the Department of English at Kansas State University from 1955 to 1960. His educational background includes a Bachelor's Degree from the State University of Iowa; a Master's Degree from Kansas State University; and graduate work at the University of Naples in Italy, where he was a Fullbright student. He is a Phi Beta Kappa, and is a Fellow in the Society for Religion in Higher Education. He spent four years working as a member of the American Friends Service Committee in Central America and in the United States. He has published fiction, poetry and literary criticism. He won the University of Nebraska Press First Book Award in 1960, and won the Kansas City Star Heart of America Poetry Award in 1964. During the past two years he has written book reviews for the Wichita Beacon and for the Kansas City Star.

Professor Cutler has read each of the eleven books named in the Information, and each of the nine books introduced by the defense.

Professor Cutler testified that all of the books named in the Information are novels; that all have discernible plots, motivations and themes; that each book concerns itself with some kind of familiar fictional problem; that

in some cases it is a solution of a crime, in some cases it is a problem of marital discord, in some cases it is the adjustment of student or artistic life; that about one half of each novel concerns itself with this kind of fictional problem; that about one half of each novel concerns itself with erotic events of various kinds.

Professor Cutler further testified that the sexual activity portrayed in the books named in the Information is generally described as sexual foreplay; that the erotic activities described in these books have to do with titilation, with urging of sexual responses, but they do not deal in any graphic or detailed way with the sexual activities although the subjective states of minds of the participants are treated at some length.

Professor Cutler further testified that in each of the books named in the Information, there is no direct reference to the male or female sex organs as such; that the language used in these novels is not offensive to the community; that the strongest expressions used in these novels are "damn" and "hell", and even these are relatively infrequent; that the language used in these novels is not vulgar; that there are no four letter Anglo-Saxon words.

Professor Cutler further characterized the books named in the Information as representative of a stratum of literature that would include such things as mystery stories, sentimental romances, self-confessional literature, all written on a very elementary level geared to individuals who have limited background and ability.

Professor Cutler further testified that each of the books introduced by the defense are in common circulation in the City of Wichita, and in the nation as a whole.

He further testified that six of the books introduced by the defense, *Eternal Fire, City of Night, Lady Chatterley's Lover, The Carpetbaggers, Tropic of Cancer,* and *My Life and Loves,* are available in the City Library of Wichita, Kansas; that each of the books introduced by the defense are available in other public libraries in the United States; that each of the books introduced by the defense are available for purchase in book stores in Wichita, Kansas.

He further testified that four of the books, *Lady Chatterley's Lover, The Carpetbaggers, Tropic of Cancer,* and *City of Night,* have been on best seller lists published by the New York Times.

Professor Cutler further testified that, in his opinion, none of the books introduced by the defense go beyond the customary limits of candor in the description or representation of sex; that in addition to the nine books introduced by the defense, other books in general circulation in the nation as a whole and in Wichita, Kansas, including *Candy* by Southern and Hoffenberg, *The Group* by McCarthy, *Pretty Leslie* by Cassill, *The Young Lovers* by Halevy, and *Nova Express* by Burroughs, contain graphic descriptions of sexual behavior which exceed in candor sexual descriptions and portrayals found in the books named in the Information; that, in his opinion, none of the latter five books go beyond the customary limits of candor, in the nation as a whole and in Wichita, Kansas, in the portrayal of matters pertaining to sex and sexual behavior.

Professor Cutler further testified that, in his opinion, the books named in the Information are not utterly without social importance; that said books have a social importance which must be understood in the context of

the audience for which they are designed; that said books are designed for people of limited background, who, like a person of more sophisticated background, would likely have interest in erotic experience and who would be able to read them and understand them.

Professor Cutler further testified that, in his opinion, the books named in the Information do not go beyond the customary community standard of common conscience in the Community of Wichita, Kansas, and in the nation as a whole in portraying sex and sexual behavior.

The plaintiff offered no evidence in rebuttal.

This Court concurs generally in the opinions expressed by Professor Cutler.

Three books introduced by the defense have received judicial approval, to-wit: *Lady Chatterley's Lover* (Grove Press, Inc. v. Christenberry, 276 F. 2d 433), *Tropic of Cancer* (Grove Press, Inc. v. Gerstein, 378 U.S. 577), and *Fanny Hill* (Larkin v. G. P. Putnams' Sons, 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 200 N.E. 2d 760). Each of these three books which have received judicial approval go far beyond any of the books named in the Information in the description or representation of matters pertaining to sex, nudity or excretion.

The Court finds that each of the books introduced by the defense, all in common circulation in Wichita, Kansas and in the nation as a whole, go far beyond any of the books named in the Information in the description or representation of matters pertaining to sex, nudity or excretion.

The Court further finds that, in addition to books introduced by the defense, other books in common cir-

culation in Wichita, Kansas and in the nation as a whole, exceed in candor sexual descriptions and portrayals found in the books named in the Information.

The Court further finds that none of the books named in the Information contain obscene, immoral, lewd or lascivious language or descriptions, manifestly tending to the corruption of the morals of persons.

The Court further finds that none of the books named in the Information go substantially beyond customary limits of candor in description or representation of sex, nudity or excretion.

The Court further finds that to the average person, applying contemporary community standards, the dominant theme of each of the books named in the Information, when taken as a whole does not appeal to prurient interest.

Based upon the evidence, the Court further finds that none of the books named in the Information are utterly without redeeming social importance.

The Court further finds that the books named in the Information are, and each of them is, expression protected by the free speech and press provisions of the Federal and State Constitutions.

The books named in the Information are not what the Court would choose for its own reading, or for reading by its family. In the opinion of the Court, these books are trash. However, the Supreme Court of the United States has held that the dissemination of views may not be suppressed because they are unpopular, annoying or distasteful. Even bad literature is entitled to constitutional protection of freedom of speech and press if it does not meet the legal test of obscenity as de-

fined by our statutes and the Supreme Court of the United States.

When compared to numerous books in common circulation in Wichita, Kansas, and in the nation as a whole, many available in public libraries and featured on "best seller" lists, the books named in the Information are mild in language and expression.

As stated by Mr. Justice Harlan in the case of *Smith v. California,* 361 U.S. 147, "The community cannot where liberty of speech and press are at issue, condemn that which it generally tolerates".

The book *Tropic of Cancer,* goes far beyond the books in question, contains virtually every filthy word in our language, and portrays sexual activity in the most graphic detail. When this book has been held by the Supreme Court of the United States to be constitutionally protected, this Court cannot condemn the books named in the Information as obscene.

It is Therefore Ordered, Adjudged and Decreed that the books named in the Information are found not to be in violation of K.S.A. 21-1102; that plaintiff's prayer for the issuance of a warrant to the Sheriff of Sedgwick County, Kansas is denied; that judgment is hereby entered for defendants and intervenors for costs, effective upon filing of the journal entry.

Tom Raum
Judge

APPENDIX E.

Unreported Opinion of the Case of People v. Luros, No. 295183 in the Superior Court for the County of Los Angeles, California.

Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiffs, vs. Milton Luros, et al., Defendants. No. 295183.

MEMORANDUM OPINION ON MOTION TO DISMISS.

There is before the court a motion to dismiss by each defendant on the ground that the subject matter involved is constitutionally protected.

The defendants are each charged by indictment with a violation of Section 182.1 of the Penal Code, conspiracy to violate Section 311.2 of the Penal Code (conspiracy to publish, print and distribute obscene books). The immediate problem is whether the eight books still remaining in the indictment are protected by the guarantee of "free speech and press" afforded by the First and Fourteenth Amendments to the United States Constitution and by Article I, Section 9 of the California Constitution guaranteeing "freedom of press and speech" to all California citizens.

In order for the People to prevail in this case there must be both a factual and legal determination that the books involved are "obscene" as defined by P.C. Section 311(a). Both Roth v. United States, 354 U.S. 476, and Zeitlin v. Arnebergh, 59 Cal.2d 901, hold that "obscenity" is both a question of law and a question of fact. In Zeitlin v. Arnebergh, supra. (hereinafter referred to as Zeitlin) at page 904, the court indicates that

prosecutions under Section 311 of the Penal Code are legal questions and not questions of fact for a jury. In any event, it would appear that the trial court should properly determine the legal question before submitting the question of fact to the jury. "Our second question turns upon whether the issue of the application of the statute to this book, within constitutional limitations, rests ultimately with the court, as a matter of law, or with the jury as a question of fact. We think it a legal issue."

At page 908 of the Zeitlin case it is indicated that should the legal issue be involved adversely to the defendant he would still be entitled to have a factual question "of obscenity" determined by a jury.

For the above reasons, as well as from the standpoint of expense to both the People and the defendants (it is estimated that the trial of this matter would take from five to seven weeks and would cost the People between $40,000 and $60,000, and that the costs to the defendants could be even a greater sum) an early determination of the legal issues is desirable.

The leading California case on the issues involved is Zeitlin v. Arnebergh, 59 Cal.2d 901. Therein is a full and complete history of P.C. § 311(a), the definition of obscenity and a determination of the meaning of the words and phrases used in that section. Whatever one may wish the law was, or the definition of obscenity to be, P.C. § 311(a) and Zeitlin v. Arnebergh are now controlling.

The Zeitlin case involved the well known book TROPIC OF CANCER which apparently has now become a standard for comparison in interpreting P.C. § 311(a). In that case the California Supreme Court

said that P.C. § 311(a) "prohibits only hard-core pornography" and held that TROPIC OF CANCER was not hard-core pornography. The court also said at page 918, "Of course identifying and delimiting 'hard-core pornography' presents its own problems."

In determining the issues in the case at bar, a comparision of TROPIC OF CANCER with each book was made. Comparisions were also made with FANNY HILL, NAKED LUNCH, CANDY, LADY CHATTERLEY'S LOVER, SEX LIFE OF A COP, JOY KILLER, and numerous (37) other books that have been determined to be "obscene" or "not obscene" in other cases.

The District Attorney has supplied the court with a psychological treatise entitled "Pornography and the Law" by Drs. Eberhard and Phyllis Kronkausen, psychiatrists. This work summarizes some of the legal, social and psychological problems connected with censorship and obscenity. As I understand this work, it is an effort to distinguish "hard-core pornography" from Erotic Realism which the authors contend is not obscene under modern legal definitions. They conclude "to qualify as such (hard-core pornography) it must deviate far from the reality of sexual matters as they are and furthemore incorporate (in the case of literature) a number of specific methods of appeal based on a certain way of distorting erotic reality." They apparently conclude that in order for a writing to qualify as hard-core pornography, it must resemble a "fairy tale" and relate to fancy rather than fact. This book has not been very helpful to me in arriving at a conclusion as to *what is hard-core pornography*, other than to point out the difficulty of the problem at hand. I would call

attention to their observations at page 214 which I take the liberty of quoting:

> "Having found serious defects in each of the legal tests of 'obscenity' now in use or under consideration by the courts one is first to ask—'Where do we go from here?' To us the answer seems clear; not toward more obscenity legislation nor toward stricter enforcement of the vague and antiquated obscenity laws with all the unavoidable abuses and mistaken judgments to which this would lead.
>
> "Instead we seriously suggest—in the absence of any evidence suggesting the existence of a 'clear and present danger' with regard to exposure of erotica—the abolution of all obscenity legislation including the legal suppression of hard-core or any other kind of pornography, erotica, or whatever the particular terminology might be. The only possible exception we might want to make to this 'hands off' rule would be the restriction of the sale of such material to *adults only*."

In testing each of the books in question by the standards set forth in P.C. § 311(a) I make the following conclusions, but upon this premise, i.e., that I am able to comprehend the average person referred to in that code section, fully understanding this may be an unjustified premise. However, I know of no other point of beginning.

For my own assistance in testing the books in question I have concluded that Penal Code § 311(a) sets forth the following standards in defining "obscene":

To the average person (applying contemporary standards (today — nationwide)), is the

I. Predominant appeal of the matter *taken as a whole* to the prurient interests, i.e.:

A. Shameful (per Webster; mortifying; humiliating; making one feel guilty; disgraced; dishonored, or confounded by the devil.)

or

B. Morbid (per Webster; diseased; akin to death; unhealthy; abnormally gloomy or unwholesome) interest in

(1) Nudity

(2) Sex

(3) Excretion

and

II. Goes substantially beyond customary limits of candor in

A. Description

or

B. Representation

and

III. Is matter *utterly* without redeeming social importance. (Utterly is defined as "to an absolute, or extreme degree; to the full extent, absolutely, altogether, entirely, fully, thoroughly, totally.")

(Redeeming "refers to the presence of matters of social importance which will recover for the material (if otherwise obscene, added) its position as constitutionally protected utterance." See Zeitlin case at page 920.)

LESBIAN SIN SONG

I.

The predominant appeal of this story as a whole is to sex. It will be argued that the appeal to sex might be in a shameful, that is, disgraceful or humiliating. manner. The Deputy District Attorney during argument added to the definition as synonyms, the words *embarrassing* or *upsetting*. There seems to be agreement, however, that the appeal of the subject matter is not to a morbid interest therein. I cannot say with reasonable certainty that the appeal of this book is to the average person's shameful interests in sex. The book does not treat sex in a more shameful manner than does TROPIC OF CANCER or FANNY HILL.

II.

There is absent the customary "obscene" words so common in TROPIC OF CANCER. The book does not even approach TROPIC OF CANCER in candor and description or representation of the sexual matters referred to.

III.

It cannot be said that the book is utterly (absolutely) worthless and without r deeming social importance, it appearing to me that it may have value to marriage counselors, psychologists, psychiatrists, and to others having a normal interest in this great and motivating natural experience called "sex", and so ably set forth by Justice Brennan in the case of Roth v. United States, 354 U.S. 487, in the following language: "Sex a great and mysterious motivating force in human life has indisputably been a subject of absorbing interest in mankind through the ages; it is one of the vital problems of human interest and public concern."

The material in this book is certainly erotic, but it does not deviate far from the reality of sex experiences as related by testimony received in this court. (Although most of it illegal, almost every type of sex deviation experienced by mankind has been observed and testified to in this court.)

TWO WOMEN IN LOVE

I.

The predominant appeal of this book is sex. However, it does not treat the subject matter in a morbid or more shameful manner than does TROPIC OF CANCER.

II.

This book does not compare in candor and description of the various sex acts as set forth in TROPIC OF CANCER. There is absent entirely therefrom the words historically obscene in the Anglo-Saxon culture and so common in TROPIC OF CANCER.

III.

The plot, the mystery and intrigue are as interesting as many "generally acceptable" books in our public library. I am unable to say that this book is utterly (totally) without redeeming social importance, or to say that it can be classified as "hard-core pornography."

None of the sex episodes could, in my opinion, be classified as pure fantasy or "fairy tale." Although some of the sexual relations referred to seem exaggerated, the "Kinsey" Reports and testimony I have heard in court would seem to indicate the details are within the scope of reality.

LESBIAN CAPTIVE

I.

The predominant appeal of this tragic story is sex. However, the book does not treat the subject matter, the plight of an unfortunate Lesbian, in a morbid or more shameful manner than TROPIC OF CANCER.

II.

The book does not go substantially beyond customary limits of candor in description or representation, and in particular it does not compare with the candor demonstrated in either TROPIC OF CANCER or FANNY HILL.

III.

This book, in dealing with the psychological background and problems of a Lesbian cannot be said to be utterly without social importance. It may well be of value to those concerned with this particular type of deviant behavior. Within my experience the events and conduct described could not be said to be pure fantasy or "fairy tale." If compared to TROPIC OF CANCER I cannot say this book is "hard-core pornography."

LESBIANS IN WHITE

I.

The predominant appeal of this story is sex. The subject matter, however, is not treated in a morbid or more shameful manner than is the same subject matter in TROPIC OF CANCER.

II.

The book does not go substantially beyond the customary limits of candor or with more candor than does TROPIC OF CANCER or FANNY HILL.

III.

This book and the subject matter are not *utterly*, entirely or to an extreme degree, without some social importance.

The mature adults or married persons who can read and tolerate some written detail of a sexual experience and who may be intrigued by the relationship of the medical profession to the narcotics problem might find this book interesting reading. Although the story relates many individual sexual experiences, including masochism, sadism and Lesbianism, it is not entirely fantasy or "fairy tale."

THE GIRLS AT WENDY'S

I.

The predominant appeal of this story as a whole is to sex. However, it does not deal with the subject matter, intercourse, homosexuality, Lesbianism and sex, sex, sex, in a morbid or more shameful manner than TROPIC OF CANCER. Like reading TROPIC OF CANCER, one soon feels disgusted and that he has had more than enough of the subject matter. Disgust, however, is different than *shame*.

II.

This book does not go substantially beyond the customary limits of candor. It does not reach the candor of, nor contain the customary "obscene words" which fill the book TROPIC OF CANCER.

III.

The story could easily be classified as trash, but it does have a "moral" or point to the plot, and I cannot say that "beyond a reasonable doubt" it is *utterly* or totally without some social importance.

THE THREE-WAY APARTMENT

I, II, III

This book also deals predominantly with the subject of sex. The same observations made to "The Girls at Wendy's", would apply to this book.

The mere suggesting of "wife swapping" is offensive to me. However, I cannot say that the book has passed the limits proscribed in Section 311(a). My personal offense is not the test. There is a possible "moral" to the story, perhaps even a psychological lesson that may be of value to marriage counselors. Considering all the marital problems and sexual frustrations I have observed as an attorney and as a judge, it is possible that this book might be of an aid to marriage counselors. I cannot say the book is *utterly* (absolutely) without redeeming social importance.

HONEY LIPS

I.

The predominant appeal of this story is sex. However, the subject matter is neither treated in a morbid manner nor in a more shameful manner than is the same subject matter in TROPIC OF CANCER.

II.

The sex acts are not described with the same degree of candor as in TROPIC OF CANCER. Words customarily offensive in mixed company and extensively, if not excessively, used in TROPIC OF CANCER are absent from this book.

III.

This is another tragic story of a young girl probably sexually predisposed psychologically towards other fe-

males, who is forcibly raped and thereafter rejected by her community. She became a true Lesbian and finds another young girl similarly disposed and the two of them agree to live together "for better or for worse."

I cannot say this book is *utterly* or totally without redeeming social importance. I put this book down with a feeling of sorrow and compassion for all Lesbians (and male homosexuals as well). It could be argued that any book tending to bring about a better understanding and compassion for any sex deviant might have a redeeming social importance regardless of the literary quality or the words used in the writing. Some will argue to the contrary. However, it is not the function of this court to adjudicate that issue.

FINDINGS

I find that none of the eight books are legally "obscene" as that word is defined by Penal Code § 311(a) and as interpreted by the California Supreme Court in the Zeitlin case. I would also find each book constitutionally protected pursuant to the ruling in Roth v. United States, supra.

CONCLUSION

The California Supreme Court has held "the court *shall* (mandatory, added) dismiss a prosecution for obscenity if it is satisfied that the material is not obscene." See Zeitlin v. Arnebergh, supra, at page 911.

Accordingly, it is the order of the court that the indictment against each of the remaining defendants be dismissed. The bail bonds are ordered exonerated.

POSTSCRIPT

Both the Deputy District Attorney, William McGinley and Stanley Fleishman, attorney for the defendants, have been most helpful to the court in supplying material and authorities. Both counsel are to be complimented for their competence and energetic advocacy of their respective positions.

None of the books involved in this case will be recommended reading for any of my five children, and I do not intend to place any of them on the family book shelves.

I commend to the Legislature for their consideration, protection of our youth in a manner suggested by both the United States Supreme Court and by the most able and competent District Attorney of Los Angeles County, Evelle J. Younger.

Dated June 14, 1965.

Joseph A. Sprankle, Jr.
Judge of the Superior Court

APPENDIX F.

Unreported Findings of Fact and Conclusions of Law in the Case of Ballantyne v. Hogue, No. 59666 in the Superior Court for the County of Tulare, California.

Superior Court of the State of California, for the County of Tulare.

Jay R. Ballantyne, District Attorney for the County of Tulare, Plaintiff, vs. Gordon Stanley Hogue, dba Drive In Liquor Mart, Defendant. No. 59666.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Above Entitled Cause came on for trial before the Honorable Meredith Wingrove on October 20, 1964 and proceeded until concluded on October 27, 1964, Robert Bereman, Assistant District Attorney for the County of Tulare, appearing on behalf of plaintiff, and Stanley Fleishman, Esq., appearing on behalf of defendant. After trial and submission of the matter, the Court makes the following:

FINDINGS OF FACT

I

Jay R. Ballantyne is the duly elected and qualified District Attorney for the County of Tulare, State of California, charged with the duty in said County to prosecute all public offenses on behalf of the People of the State of California. (See Govt. C. §§26500 et seq., and cases thereunder.)

II

Gordon Stanley Hogue is a bookseller operating a retail bookstore and doing business as Drive In Liquor Mart at 232 North K Street, in the City of Tulare, County of Tulare, State of California.

III

During the course of the proper discharge and performance of the duties of his office, plaintiff is required to institute proceedings before magistrates for the arrest of persons reasonably suspected of public offenses, when plaintiff has information that such offenses have been committed. (See, Govt. C. §§26500 et seq.)

IV

During the course of the proper discharge and performance of the duties of his office, plaintiff is required to protect every citizen's civil liberties or taking of property without due process of law. (Ibid.)

V

Plaintiff is obligated to all the People to avoid all possible error in the conduct of cases. (Ibid.)

VI

Defendant exhibited for sale and sold at his retail store the following three books:

1. "ORGY HOUSE" by Andrew Shole;
2. "PASSION PUPPETT" by Don Wellmen; and
3. "THE LUST CIRCUIT" by Don Holliday.

VII

Plaintiff read a copy of each of the said books and believed that each book was obscene.

VIII

Defendant believed that each book was constitutionally protected expression and not obscene.

IX

An actual controversy exists between plaintiff and defendant in relation to whether or not said books are obscene.

X

Plaintiff does not want to allow a wrong to be done, or a crime to be committed, by defendant to or against the People of the State of California; and plaintiff does not want to do a wrong to the defendant. (See, *Tolle v. Struve,* 124 C.A.263, 271)

XI

Plaintiff desires to perform his duties as District Attorney in accordance with the laws, and especially in accordance with those duties mentioned or alluded to in Paragraphs I, III, IV, V, VII and X of these Findings of Fact

XII

The question as to whether said books are obscene matter or is not obscene matter is a question of constitutional fact which cannot be decided by plaintiff. (See, *Zeitlin v. Arnebergh,* 59 C.2d 901)

XIII

If said books are obscene matter, plaintiff intends to prosecute defendant.

XIV

If said books are not obscene matter, plaintiff does not intend to prosecute defendant.

XV

The Court has read the book "ORGY HOUSE" by Andrew Shole, and considered the evidence and the law as the same is pertinent to said book.

XVI

(a) The book "ORGY HOUSE" is within customary limits of candor in the description or representation of matters pertaining to sex, nudity or excretion; it does not go beyond customary limits of candor in the description or representation of such matters.

(b) The book "ORGY HOUSE" is a novel and, like novels generally, interprets, criticizes, illuminates and mirrors life. It appeals to the normal interest the average person has in matters pertaining to sex and the human condition. Taken as a whole and applying contemporary standards, the predominant appeal of "ORGY HOUSE" is not to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion of the average person.

(c) The book "ORGY HOUSE" has value. It is not utterly without redeeming social importance.

XVII

The Court has read the book "PASSION PUPPETT" by Don Wellman, and considered the evidence and the law as the same is pertinent to said book.

XVIII

(a) The book "PASSION PUPPETT" is within customary limits of candor in the description or representation of matters pertaining to sex, nudity or excretion; it does not go beyond customary limits of candor in the description or representation of such matters.

(b) The book "PASSION PUPPETT" is a novel and, like novels generally, interprets, criticizes, illuminates and mirrors life. It appeals to the normal interest the average person has in matters pertaining to sex and the human condition. Taken as a whole and applying contemporary standards, the predominant appeal of "PASSION PUPPETT" is not to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion of the average person.

(c) The book "PASSION PUPPETT" has value. It is not utterly without redeeming social importance.

XIX

The Court has read the book "THE LUST CIRCUIT" by Don Holliday, and considered the evidence and the law as the same is pertinent to said book.

XX

(a) The book "THE LUST CIRCUIT" is within customary limits of candor in the description or representation of matters pertaining to sex, nudity or excretion; it does not go beyond customary limits of candor in the description or representation of such matters.

(b) The book "THE LUST CIRCUIT" is a novel and, like novels generally, interprets, criticizes, illuminates and mirrors life. It appeals to the normal interest the average person has in matters pertaining to sex and the human condition. Taken as a whole and applying contemporary standards, the predominant appeal of "THE LUST CIRCUIT" is not to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion of the average person.

(c) The book "THE LUST CIRCUIT" has value. It is not utterly without redeeming social importance.

CONCLUSIONS OF LAW

I

An actual controversy exists between plaintiff and defendant as to whether "ORGY HOUSE", "PASSION PUPPETT" and "THE LUST CIRCUIT", or any of them, is obscene.

II

The State obscenity law prohibiting the keeping for sale and selling of obscene books proscribes only hard core pornography. *Zeitlin v. Arnebergh,* 59 C.2d 901, 31 Cal.Rptr. 800.

III

The First Amendment's basic guaranty, as the same is incorporated into the Fourteenth Amendment, is freedom to advocate ideas, the very heart of constitutionally protected liberty. *Kingsley Int'l Pic. v. Regents,* 360 U.S. 684.

IV

The Federal and State Constitutions protect expression without regard to the truth or popularity of the ideas and beliefs which are offered. *N.A.A.C.P. v. Button,* 371 U.S. 415. Generally, all ideas—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties of the First Amendment. *Alberts v. California,* 354 U.S. 476; *Zeitlin v. Arnebergh, supra.*

V

In order to give color, texture and meaning to the whole of his expression, a writer may sometimes feel that he must depict matters which, standing alone, would unanimously be condemned as beyond the limits of propriety. *Zeitlin v. Arnebergh, supra; Grove Press,*

Inc. v. Christenberry, 276 F. 2d 433, affirming 175 F.Supp. 488.

VI

A writer may employ the device of artistic shock often present in the myriad of art forms which our society demands for its intellectual and cultural growth. *Zeitlin v. Arnebergh, supra.*

VII

The mere fact that the books contain a large number of descriptions of sexual activity does not mean they are outside the protection of the free speech and press provisions of the Federal and State Constitutions. Sex is a proper subject for works of fiction. *Grove Press, Inc. v. Christenberry, supra.*

VIII

Undue legal restraint must be guarded against in cases such as this since the exercise of censorship tends to feed upon itself and to extend into, and encroach upon, areas of personal liberties which are the very foundation of a free society. We should not attempt to suppress by law writings dealing with those sorrier aspects of human behavior in our national life that most of us, had we the choice, would change. *Zeitlin v. Arnebergh, supra; City of Chgo. v. Kimmel,* 201 N.E. 2d 386.

IX

It is of the utmost importance in this field that judges be not motivated to assume the guise of censors by reason of personal predilections, and that decisions be not dictated by their personal whims with little consideration given to the fact that liberty is not divisible and that when we deny its privileges to others we place

our own in jeopardy, or by pressure subconsciously exerted by groups of well-meaning vigilante guardians of the public morals who often refuse to recognize that free societies are dynamic, and that literature and art, including unsophisticated simple novels are merely the mirror reflections of some phase of existing life. Truth, so evidenced, is often bitter and distasteful, but so are many facets of our existence for there is a huge and disproportionate abundance of evil on earth. *People v. Birch, et al.*, 40 Misc. 2d 626, 243 N.Y.S.2d .... (N.Y. S.Ct.1963)

X

Totalitarian dictated monotonous conformity in the use of the written word is too great a price to pay to receive the approbation of the ultra-sensitive or the easily psychically devastated. Writing can reflect the changes which are taking place in a culture. What is good or bad in the past or present, or may be in the future, is described by perceptive writers in various ways and and many dialects. *People v. Birch, supra.*

XI

The California obscenity law reposes no authority in this Court to act as censor of the manners or formulation of the written word. The danger of State censorship has been too graphically demonstrated by the current decadence of Soviet art for this Court to assume that the State obscenity law intended to import such debilitation. *Zeitlin v. Arnebergh, supra.*

XII

The book "ORGY HOUSE" is not obscene but, on the contrary, is constitutionally protected expression.

XIII

The book "PASSION PUPPETT" is not obscene, but, on the contrary, is constitutionally protected expression.

XIV

The book "THE LUST CIRCUIT" is not obscene but, on the contrary, is constitutionally protected expression.

XV

Defendant is entitled to a judgment declaring that:

(a) the book "ORGY HOUSE":

(1) is not obscene but, on the contrary, is expression protected by the free speech and press provisions of the Federal and State Constitutions.

(b) the book "PASSION PUPPETT":

(1) is not obscene but, on the contrary, is expression protected by the free speech and press provisions of the Federal and State Constitutions.

(c) the book "THE LUST CIRCUIT":

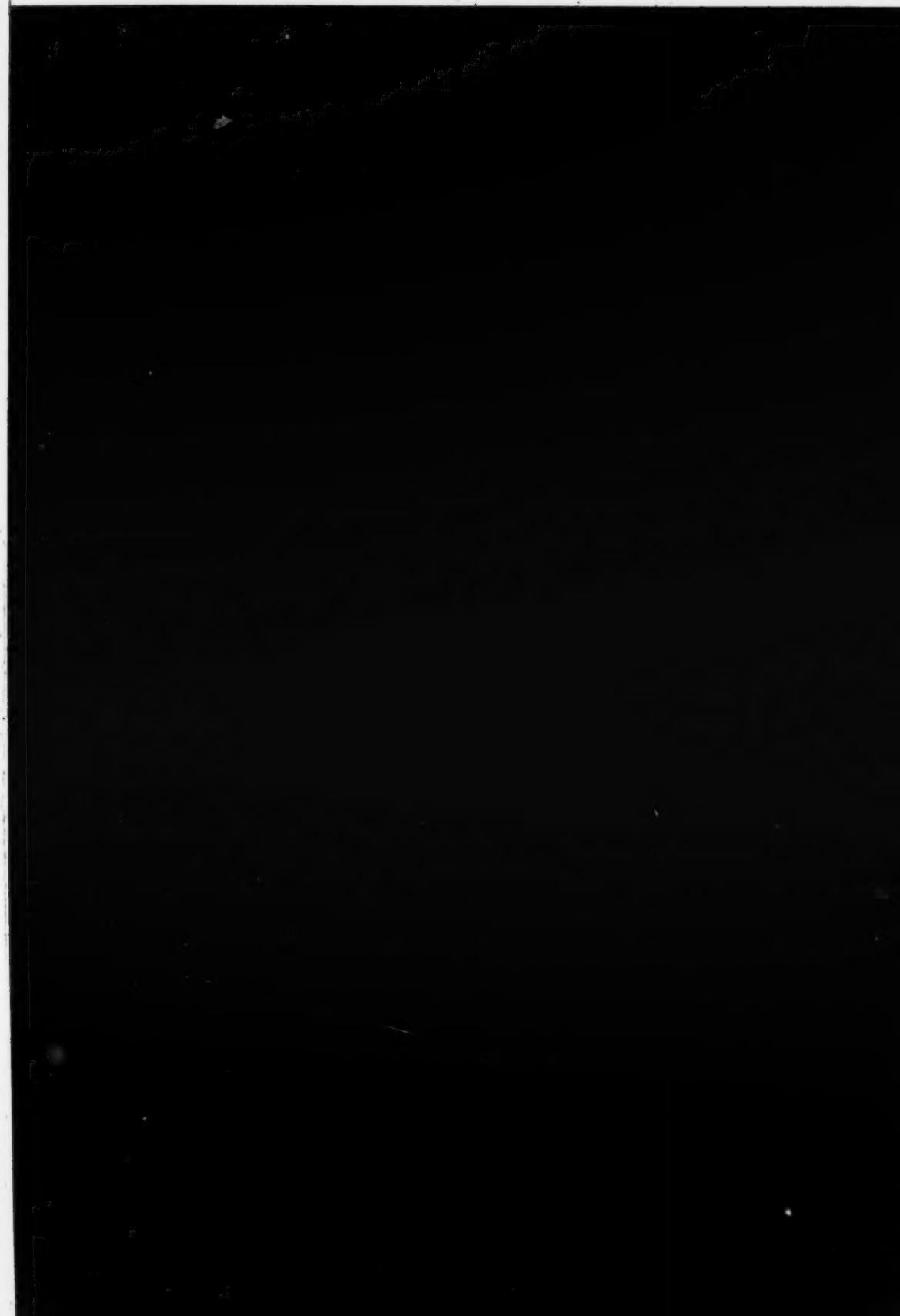
(1) is not obscene but, on the contrary, is expression protected by the free speech and press provisions of the Federal and State Constitutions.

Let Judgment Be Entered Accordingly.

Dated: This 24th day of November, 1964.

Meredith Wingrove
Judge of the Superior Court





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233-880—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 323

BOOKS INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–8) is reported at 358 F. 2d 935.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9) was filed on April 12, 1966, and a petition for rehearing was denied on May 11, 1966. On June 6, 1966, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to July 10, 1966, and the petition was filed on July 8. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient.

2. Whether the trial court's instructions were proper.

3. Whether the trial court erred in denying admission of the allegedly comparable materials offered by petitioner.

STATEMENT

Petitioner, a Rhode Island corporation engaged in the wholesale distribution of paperback books, was convicted on one count of causing the transportation in commerce from Rhode Island to Massachusetts, for the purpose of sale and distribution, of more than two copies of an obscene book, in violation of 18 U.S.C. 1465. Petitioner was fined fifteen hundred dollars.

The book upon which the conviction was based is entitled *Lust Job,* by Tony Calvano. As described by the court of appeals (358 F. 2d at 936–937; Pet. App. 2–3), the book:

> * * * set forth, in the form of a novel, a tale exclusively devoted to the sexual adventures of its principal characters. Adulteries, seductions, and orgies are the only events of importance. The contacts described include not only sexual intercourse, but sodomy and other perversions. There is not any serious effort to portray the reality of cultural or social conditions of even the most neurotic or sordid portion of the population. Description of the locale is minimal. The style is flaccid, repetitive, and unreflective of the author's individuality.
>
> On the front cover of the book is an unclothed woman, her back toward the reader. She is seated on the floor, her back and but-

tocks showing, her head tilted backwards and her arms clasping below the knees the trousers of a clothed man. The title *Lust Job* is printed so that it crosses the woman's back. Above the woman's head and across the man's trousers are the words "He climbed to the top on a ladder of sin." On the rear cover appears the following description of the book:

"SELFISH PASSIONS * * *

drove Steve Rapallo, a handsome, eager young executive as he clawed his way up the lust ladder to success. Success in money and bed, the only two things that seemed to matter. And to hell with the way he got them. Take Carol—which he did—the wanton wife of his boss, whose only desire was to get between the sheets and stay there. And Rapallo was just the chamber stud she needed. It was a ball, and it was Miami Beach and it was the annual convention. A time for fun. A time for sin. A time for shame and lust and everything that added up to wild bedroom orgies where nobody cared what anybody did as long as they did it and never stopped!

* * * GUTTER LOVE!"[1]

[1] In addition to the foregoing, the book also contained, immediately following the text, a list of "[o]ther Night-stand books you will enjoy," including *Love Addict*, *Lust Club*, *Sex Gang*, *Gang Girl*, *Campus Tramp*, *Carnival of Lust*, *The Wild Night*, *Summertime Affair*, *Party Girl*, *Born for Sin*, *The Adulterers*, *Naked Holiday*, *Sin Girls*, *No Longer a Virgin*, *Passion School*, *Sin on Wheels*, *Sin Hotel*, *Miami Call Girl*, *The Sin Damned*, *Passion Trap*, *The Girl Upstairs*, *Lesbian Love*, *Sex Jungle*, *The Lustful One*, and *The Wife Swappers* (A.A. 106). ("A.A." refers to petitioner's appendix in the court of appeals; "G.A." refers to the government's appendix in that court; "Tr." refers to the trial transcript; "D.R.I." refers to petitioner's requested instructions at trial.)

The government's evidence showed that one Irving F. Ephraim, a retail bookseller in Worcester, Massachusetts, entered into an "automatic plan" with petitioner, whereby the latter would, on its own initiative, send him books of its own choosing (Tr. 16–17). On or about May 30, 1962, Ephraim received from petitioner, in accordance with this plan, a carton of paperback books, thirty-five of which were copies of *Lust Job* (Tr. 22–32, 40–41, 46, 50–56, 65–66).[2] The government completed its direct case by submission of the book to the jury.

Petitioner presented, as literary experts, two assistant professors of English literature, who testified that the book was poor literature but, in their opinion, not legally obscene. Both offered, as the basis for this conclusion, their opinion that, judged against current literature with which they were familiar, the book did not offend community standards. One stated that the dominant theme of the book was the "advocating of moral responsibility and the leading of a moral life" (Tr. 140). The other testified that the dominant theme of the book was "that sexual promiscuity erodes one's personality" (Tr. 178), and he found "this element of condemnation of sexual behavior" to be its

[2] The invoice accompanying the carton identified *Lust Job* only by number and not by name. Ephraim testified that upon receipt of cartons of this type of material, he would verify only the total copies in the carton against the invoice and not the total copies of each identification number listed thereon, because "[t]his is not books. Books are entirely different. These are paperbacks" (Tr. 42).

"redeeming quality" (Tr. 196).[3] Petitioner also sought to offer copies of various magazines and books into evidence as probative of community standards, but the trial judge refused to admit the material.

The trial judge, in denying a motion for a new trial, found the book to be "clearly and totally without any literary value or any social importance" and held "that the jury was well warranted in finding that the dominant theme of the book is an appeal to the prurient interest of the average person and that it goes beyond all acceptable standards of candor in its representation of and treatment of sexual matters" (A.A. 119–120). The court of appeals held that "there was adequate evidence in the text of the novel, without any reference to the covers, to warrant a factual determination that the dominant theme of the book taken as a whole appeals to a prurient interest in sex, that the book is patently offensive because it affronts contemporary community standards relating to the description of sexual matters, and that the material is utterly without redeeming social value" (358 F. 2d

[3] Both witnesses were asked on cross-examination, over the objection of petitioner, whether in their opinion the description of the book appearing on the rear cover was indicative of its dominant theme. One witness acknowledged that the description advocated the opposite of moral responsibility (Tr. 150), but asserted that such items have no bearing on the dominant theme of books because they "are usually written by someone in the publishing house and not by the author himself" (Tr. 148) and are used as "a kind of attractive lure in order to get someone to buy the text" (Tr. 149). The other acknowledged that "clearly blurbs are put on covers of books to induce sales" (Tr. 202), but also asserted that they do not indicate the dominant theme of a book because they are the product of the publisher and not of the author (Tr. 203).

at 937; Pet. App. 4). Additionally, the court of appeals held that it could "take into account the front and back covers of *Lust Job* and from them * * * reach a conclusion that there was pandering and an exploitation of interests in titillation" (358 F. 2d at 938; Pet. App. 5) and "that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values" (358 F. 2d at 938; Pet. App. 6).

ARGUMENT

1. There is no occasion for this Court to review the sufficiency of the evidence in this case. As in *Ginsburg* v. *United States*, 383 U.S. 463, 471, the evidence shows that petitioner was engaged in the "business of pandering to 'the widespread weakness for titillation by pornography'" and that the book in issue here was knowingly and purposefully "sold [by petitioner] as stock in trade of the sordid business of pandering" (*id.* at 467). That the purpose of the distribution of the book was pandering is, we believe, demonstrated by its text, by its mode of presentation (*i.e.*, the promotional matter on its front and back covers and on the first inside page) and by the list, appearing after the text, of other books published under the same imprint.

In addition, there was evidence from which the jury could infer that petitioner had knowledge or notice of the contents of the text and of the mode of presentation. The book was shipped by petitioner to the retailer in the regular course of business under an arrangement by which petitioner selected the books to send the retailer. The books in the shipment were

identified only by number and not by title, and, according to the retailer's testimony, were all fungible paperbacks with no independent literary standing as "books." The book in issue here was published as one of a line of books whose titles proclaim them to be "sex novels." From this evidence, we submit, the jury could reasonably infer that petitioner was in the business of wholesaling "sex novels" of the *Last Job* type, and that someone in authority in the corporation must have had knowledge or notice of the character of books appearing under the "Nightstand" imprint and of their mode of presentation to the reading public. If there was some other explanation for petitioner's shipment of this book to Ephraim—for example, that petitioner had acquired copies of it unknowingly from a publisher from whom petitioner usually obtained an entirely different type of book, and had transshipped the copies to Ephraim without examining them, or that the book was acquired and shipped by a subordinate employee who exceeded the scope of his authority—it was a matter peculiarly within petitioner's own knowledge, and petitioner therefore had the burden of coming forward with evidence in this regard. Compare *Edwards* v. *United States*, 334 F. 2d 360, 366 (C.A. 5), certiorari denied, 379 U.S. 1000.[4]

[4] There is no question presented in this case, as there is in *Redrup* v. *New York*, No. 3, this Term, and *Austin* v. *Kentucky*, No. 16, this Term, concerning the proof necessary to establish an individual's responsibility for or willful and knowing association with the activities of a business enterprise where his relationship is that of minor employee or non-managing owner. Moreover, those cases involve the retailing of

2. Petitioner asserts that the trial court committed error (a) by instructing, in regard to scienter, that the jury had to find only "that the defendant knew the contents of said book at the time of transportation of the same for sale or distribution" (G.A. 195); and by failing to instruct, as petitioner requested, (b) that "a work cannot be proscribed unless it is 'utterly' without social importance" and (c) that "[t]he average person, as construed and applied, must be the adult within the community."

a. The trial court's instruction on scienter was substantially that which petitioner requested (D.R.I. 9, A.A. 126; D.R.I. 21, A.A. 130). No challenge to this instruction was made below.

b. Although petitioner requested an instruction on social value (D.R.I. 40, A.A. 134–135), it neither objected to the trial court's failure to give the instruction (see Tr. of Charge to Jury, pp. 16–18), nor cited the failure as one of its grounds for moving for a new trial (see A.A. 107–110),[5] nor on appeal urged the failure as a ground for reversal (see App. Brief, pp. 55, 57–60). In our memorandum in *Aday* v. *United*

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books, whereas petitioner here is a wholesaler shown to have selected on its own initiative the books that it transported in commerce.

[5] In moving for a new trial, petitioner urged, on the basis of *Jacobellis* v. *Ohio*, 378 U.S. 184, that "[t]he social value test is independent of the prurient interest test, and there is no warrant for weighing the quantum of social value against the quantum of prurient interest" (A.A. 111). The argument was made, however, in requesting the trial court to exercise its independent constitutional judgment and rule the book to be not obscene, and not in urging that the court had erred in failing to give the requested instruction on social value.

States, No. 149 this Term, we acknowledge that "an issue whether material has redeeming social value and was traded on the basis of that value is an important one in a prosecution of a defendant charged with the distribution of the material as obscenity" (p. 3), and suggest that because the opinion of the court of appeals "fails to consider the claim that the instructions to the jury were fatally defective under the standard enunciated in" *Memoirs* v. *Massachusetts,* 383 U.S. 413, "the appropriate disposition of the petition would be to remand the case to the court below for further consideration in the light of" that decision (p. 4). We consider the present case distinguishable. In view of petitioner's abandonment below of the issue of the proper instruction, the court of appeals had no opportunity to pass on that issue. Accordingly, we believe there is no occasion for a remand here.

c. While the trial court did not instruct, as petitioner requested, that the average person must be the adult within the community, it did instruct that the test (G.A. 196):

> is not whether [the book] would arouse lustful thoughts in those comprising a particular segment of our community, such as the young, the immature, or highly prudish, or, on the other hand, would leave another segment, such as the scientific or highly educated, or the so-called wordly-wise and sophisticated, indifferent and unmoved. The test is the effect of the book considered as a whole not upon any particular class, but upon all those it was likely to reach; in other words, its impact upon the average person in our national community in 1962.

As the court of appeals held, a jury of laymen would regard this instruction "as directing attention to the effect of the book upon a typical mature adult reader in the audience which [petitioner's] method of distribution of *Lust Job* sought to reach" (358 F. 2d at 939; Pet. App. 7).

3. The trial court properly denied admission to the allegedly comparable materials offered by petitioner. There is some question whether "community standards" is a "fact" to be proved. As Mr. Justice Brennan noted in his opinion in *Jacobellis* v. *Ohio*, 378 U.S. 184, 192–193, the concept of "contemporary community standards" was introduced into the law of obscenity in the opinion of Judge Learned Hand in *United States* v. *Kennerley*, 209 Fed. 119, 121 (S.D.N.Y.). There and in *United States* v. *Levine*, 83 F. 2d 156, 157 (C.A. 2), Judge Hand made clear that a jury is to apply such standards in the same manner that a negligence jury applies the tort standard of care—on the basis of experience and general knowledge rather than on the basis of evidence concerning the conduct of others in like circumstances.

But, in any event, this issue is not presented here. Clearly, we believe, a work is not relevant to demonstrate the non-obscenity of another work unless both are substantially similar and the offered work is not obscene. *Womack* v. *United States*, 294 F. 2d 204, 206 (C.A.D.C.). Petitioner made no showing of similarity here. And, as the court of appeals noted (358 F. 2d at 939; Pet. App. 8), "it is not true that every item sold is necessarily not obscene. Hence, not every book sold in the market is admissible to

test the obscenity of" a book named in an obscenity indictment. See, also, *United States* v. *West Coast News Company,* 357 F. 2d 855, 860–861 (C.A. 6), petition for certiorari pending, *sub nom. Aday* v. *United States,* No. 149, this Term; *United States* v. *Oakley,* 290 F. 2d 517, 519 (C.A. 6), certiorari denied, 368 U.S. 888.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
ROBERT S. ERDAHL,
MARSHALL TAMOR GOLDING,
Attorneys.

OCTOBER 1966.

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* Petitioner claims, as an additional ground for the admissibility of the offered materials, that they would establish "the absence of unlawful knowledge and intent" on its part (Pet. 30). It is difficult, however, to perceive the bearing that materials distributed by others would have on the question whether or not petitioner distributed *this* book for the purpose of pandering to a weakness for pornographic titillation.

U.S. GOVERNMENT PRINTING OFFICE: 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

BOOKS, INC. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 323. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the First Circuit is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE would grant the petition and set the case for oral argument.

MR. JUSTICE CLARK would grant the petition and affirm.

MR. JUSTICE HARLAN concurs in the reversal on the basis of the reasoning set forth in his opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478.